SUPREME COURT, U. S.

No. 1224

APR 3 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term 1968

In the Matter of: THE WINGREEN COMPANY, ET AL,

J. H. BROCK, as Trustee for THE WINGREEN COMPANY, a Florida corporation; THE DANIA CORPORATION, a Florida corporation; and THE LAKE WORTH COMPANY, a Florida corporation,

Petitioner,

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Massachusetts corporation,

Respondent.

Petition for a Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

---

IRVING M. WOLFF
Attorney for Petitioner
916 Biscayne Bldg.
Miami, Florida

INDEX

	Page
Opinions Below	2
Jurisdiction	3
Questions Presented	3
Statutory Provisions Involved	5
Statement of the Case	8
Reasons for Granting the Writ	19
Conclusion	27

TABLE OF CONTENTS

	Page
Appendix A — The Opinion below, United States Court of Appeals for the Fifth Circuit (No. 25,303)	App. 2
Appendix B — The Opinion below, United States Court of Appeals for the Fifth Circuit (Nos. 26479 and 26711)	App. 13
Appendix C — Order United States Court of Appeals for the Fifth Circuit Granting Leave to Take Interlocutory Appeal and Denying Motion to Dismiss (No. 25,303)	App. 15
Appendix D — Order United States Court of Appeals for the Fifth Circuit, Order Dispensing with Printing of the Record on Appeal but Requiring a Reproduced Joint Appendix (No. 25,303)	App. 17
Appendix E — Order, United States Court of Appeals for the Fifth Circuit, Denying Appellee's Motion to Summarily Determine the Appeal and Further Limiting the Joint Appendix (No. 25,303)	App. 19
Appendix F — Order entered United States Court of Appeals for the Fifth Circuit Granting Appellant's Motion to Strike Certain Designated Items by the Appellee from the Printed Joint Appendix (No. 25,303)	App. 21
Appendix G — Order, United States Court of Appeals for the Fifth Circuit, Diminishing Designation of Contents of the Record to be Prepared on Appeal (No. 26,479)	App. 23

TABLE OF CONTENTS (cont.)

Page

Appendix H — Order, United States Court of Appeals for the Fifth Circuit, Granting Appellee's Petition to Supplement the Record (No. 26,479) ..... App. 25

Appendix I — United States Court of Appeals for the Fifth Circuit, Order Granting Appellant's Petition to Supplement the Record ..... App. 27

Appendix J — Order of United States District Court in and for the Southern District of Florida Dated January 17, 1969 Granting Leave to the Trustee to Seek a Writ of Certiorari in the Supreme Court of the United States ..... App. 29

Appendix K — Order of United States District Court in and for the Southern District of Florida Dated January 30, 1967 Awarding Additional Interim Fees to the Trustee and his Attorney (Basis of Appeal to United States Court of Appeals for the Fifth Circuit, Cause No. 25,303) ..... App. 31

Appendix L — Order to United States District Court in and for the Southern District of Florida Dated February 20, 1968 Awarding Additional Interim Fees to the Trustee and his Attorney. (Basis of Appeal to United States Court of Appeals for the Fifth Circuit Cause No. 26,479) ..... App. 39

TABLE OF CONTENTS (cont.)

Page

Appendix M — Order in United States District Court Dated August 7, 1968 Awarding Additional Interim Fees to the Trustee and his Attorney (Basis of Appeal to United States Court of Appeals for the Fifth Circuit Cause No. 26,711) ..... App. 49

Appendix N — Judgment United States Court of Appeals for the Fifth Circuit Dated December 5, 1968 in Causes Nos. 26,479 and 26,711 App. 63

Appendix O — Judgment United States Court of Appeals for the Fifth Circuit Dated December 5, 1968 in Cause No. 25,303 ..... App. 65

Appendix P — Order United States Court of Appeals for the Fifth Circuit Dated January 6, 1969 Denying Petition for Rehearing, Cause No. 25,303 ..... App. 67

Appendix Q — Order United States Court of Appeals for the Fifth Circuit Dated January 15, 1969 Denying Petition for Rehearing Nunc Pro Tunc as of January 6, 1969 in Cause Nos. 26,479 and 26,711 ..... App. 69

Appendix R — Motion filed by Appellant in the United States Court of Appeals for the Fifth Circuit to tax costs against the Appellee including the printing of Joint Appendixes, records, briefs, etc., in Cause Nos. 25,303, 26,479, and 26,711 ..... App. 71

TABLE OF CONTENTS (cont.)

CASES

	Page
Chotiner, In re, 218 Fed. 813 (3rd Cir. 1914)	22
Levitt v. Robinson, 402 Fed.2d 753 (9th Cir. 1968)	27
Lungreen v. Freeman, 307 Fed.2d 104 (9th Cir. 1962)	27
Manda v. Sinclair, 278 Fed.2d 629 (5th Cir. 1960)	20
Massachusetts Mutual Life Insurance Co. v. Brock, 405 Fed.2d 429 (5th Cir. 1968)	2, 20, 21, 22, 23, 25
Mayer v. National Missile & Electronics, 326 Fed. 2d 401 (9th Cir. 1964)	20
Michigan-Ohio Building Corp., In re, 117 Fed.2d 191 (7th Cir. 1941)	20
Ritchie v. Cheseborough-Ponds Inc., 281 Fed.2d 755 (2nd Cir. 1960)	20
Snider v. England, 374 Fed.2d 717 (9th Cir. 1967)	27
Stein v. Hemker, 157 Fed.2d 740 (8th Cir.) 1946)	26
32-36 North State Street Building Corp., In re, 164 Fed.2d 205 & 7th Cir. 1947)	26
West Coast Investors, Inc., Debtor, In re, 388 Fed. 2d 622 (9th Cir. 1968)	26
Young v. Garrett, 159 Fed.2d 634 (8th Cir. 1947)	24

TABLE OF CONTENTS (cont.)
STATUTES

	Page
United States Code Annotated	
Title 28 §1254(1)	3
Title 28 §1291	20, 21, 22
Title 28 §1292	7, 20, 21
Title 28 §2101(f)	3
Bankruptcy Act and United States Code Annotated	
11 U.S.C.A. §47—Bankruptcy Act Section 24	3, 5
11 U.S.C.A. §567(1)—Bankruptcy Act Section 167	10
11 U.S.C.A. §606—Bankruptcy Act Section 206	6, 19
11 U.S.C.A. §650—Bankruptcy Act Section 250	6, 19, 21, 22

MISCELLANEOUS

	Page
Collier on Bankruptcy, 14th Ed:	
Vol. 6A, p. 312	20

IN THE

Supreme Court of the United States

October Term 1968

No. _____

In the Matter of: THE WINGREEN COMPANY, ET AL,

J. H. BROCK, as Trustee for THE WINGREEN COMPANY, a Florida corporation; THE DANIA CORPORATION, a Florida corporation; and THE LAKE WORTH COMPANY, a Florida corporation,

Petitioner,

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Massachusetts corporation,

Respondent.

Petition for a Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

---

To the Honorable Earl C. Warren, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States.

The Petitioner, J. H. BROCK, as Trustee for The Wingreen Company, a Florida corporation; The Dania Corporation, a Florida corporation; and The Lake Worth Company, a Florida corporation, respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in the above case.

In accordance with Rule 23(5) Rules of the Supreme Court of the United States [Adopted June 12, 1967 effective October 2, 1967 28 U.S.C.A. Rules of the Supreme Court, Rule 23, p. 39], your Petitioner seeks a writ of certiorari addressed to two decisions and judgments entered by the United States Court of Appeals for the Fifth Circuit. The judgments were entered in the same cause of action, but involved two different rulings of the trial court, however, the appellate decisions disposed of identical questions. Your Petitioner thus deems it sufficient to file a single petition for writ of certiorari addressed to all of the decisions and opinions of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Opinion of the District Court of the Southern District of Florida dated January 30, 1967 is not report, but is reproduced at Appendix K, App. p. 31 (R. 1218).

The Opinion of the District Court of the Southern District of Florida dated February 19, 1968 is not reported but is reproduced at Appendix L, App. p. 39.

The Opinion of the District Court of the Southern District of Florida dated August 6, 1968 is not reported but is reproduced at Appendix M, App. p. 49 (R. Vol. V1, 404).

The Opinions of the Court of Appeals for the Fifth Circuit dated December 5, 1968 is reported at 405 Fed.2d 429 and 405 Fed.2d 435 and for the Court's convenience are reproduced at Appendix A and B, App. pp. 2 and 13 (R. 1256-1259).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on December 5, 1968 and copies thereof are appended to this petition in Appendixes N and O, App. pp. 63 and 65 (R. 1270-1).

On January 6, 1969, the Court of Appeals for the Fifth Circuit denied the petitions for rehearings, copies of said Orders are appended to this petition as Appendixes P and Q, App. pp. 67 and 69 (R. 1305-6).

No stay of mandate had been sought either in the United States Court of Appeals for the Fifth Circuit or in this Honorable Court.

The petition is timely filed. [Title 28 U.S.C.A. Sec. 2101(f)]; 62 Stat. 961; and 63 Stat. 104.

The jurisdiction of this Court is invoked under Title 11 U.S.C.A. Sec. 47(c); [30 Stat. 553 as amended]; and Title 28 U.S.C.A. 1254(1); [62 Stat. 928].

QUESTIONS PRESENTED

1. Can a United States Court of Appeals, notwithstanding the provisions of the Bankruptcy Act, direct that an appeal from an interim award of fees for a reorganization trustee and his attorney be presented, other than on the original record, and other than summarily?

2. Though it is admitted that the right to be heard granted to a creditor in proceedings in Reorganization contains the right to appeal, however, does such right to appeal exist when the order or decree sought to be appealed does not materially, substantially and adversely affect the appellant?

3. This Honorable Court, in the exercise of its supervisory jurisdiction, is called upon to decide questions of a substantial nature which have not been heretofore settled by this Court:

a) Where an appellant seeks to review an interim award of fees to a reorganization trustee and his attorney, are the proceedings governed by the provisions of the Bankruptcy Act or are they governed by the statutes dealing with interlocutory appeals?

b) Where an Opinion of the United States Court of Appeals contains obvious omission and error, not supported by the record, can this Honorable Court correct the same so that the Opinion is in conformity with the record?

c) Where a trial court did not abuse its discretion, commit clearly erroneous error, make any mistake in the application of ruling law, can a United States Court of Appeals, in its effort to retry the cause, contrary to its jurisdiction, insert a "legal standard" as a justification of its application of extra-judicial jurisdiction?

STATUTES INVOLVED

1. Section 24 of the Bankruptcy Act, [Title 11 U.S.C.A. §47].

> "24. Jurisdiction of Appellate Courts. a. The United States court of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: Provided, however, That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: And provided further, That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.
>
> b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.
>
> c. The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and order of the United States court of appeals in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

2. Section 206 of the Bankruptcy Act, [Title 11 U.S.C.A. §606].

"The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter. The judge may, for cause shown, permit a labor union or employees' association, representative of employees of the debtor, to be heard on the economic soundness of the plan affecting the interests of the employees."

3. Section 250 of the Bankruptcy Act, [Title 11 U.S.C.A. §650].

"Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the court of appeals independently of other appeals in the proceedings, and shall be summarily heard upon the original papers."

4. Title 28 U.S.C.A. 1291

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

5. Title 28 U.S.C.A. Sec. 1292.

(a) The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district court or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting."

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section shall be of the opinion that

such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

STATEMENT OF THE CASE

It is respectfully brought to this Court's attention that the instant Petition for Certiorari deals with three interim awards of fees for the Trustee and his attorney in reorganization and, hence the statement of the case, while lengthy, attempts to present the proceedings conducted and disposed of by both lower courts.

On January 25, 1966 the three debtor corporations, The Wingreen Company, The Dania Corporation, and The Lake Worth Company, all controlled by the same individuals, and being interrelated as to indebtednesses, filed three individual voluntary petitions seeking to have their affairs reorganized in accordance with Chapter X provisions of the Bankruptcy Act. The petitions were filed in the United States District Court of the Southern District of Florida. (R. 1, 11 and 27).

The three estates were consolidated for administrative purposes because of their interrelationship and general management. A Consolidation Order and a Restraining Order were entered on January 25, 1966. One of the provisions of the Orders set a time and place for hearings as to whether or not the petitions had been filed in good faith. (R. 37).

The Wingreen Company was a real estate holding company and its business consisted of acquiring, either through direct ownership or through leasehold interests, real estate and developing the same by improving the parcels with apartment houses, office buildings, motels, etc. It did business in a wide spread area in Florida, having holdings in Alachua, Brevard, Dade and Escambia Counties. The assets of The Wingreen Company in accordance with statements issued by the company and as best as the same could be verified by the Trustee could be evaluated at $9,280,500.00, and the liabilities as established by the Trustee were $10,327,141.64[1]

The Lake Worth Company was a holding company which controlled 45,050[2] shares of the capital stock of the First National Bank in Lake Worth. These stockholdings were pledged to repay an encumbrance of $2,911,430.08. The encumbrance was created at the time of the acquisition of the holdings and far exceeded the stock's value, either in the open market or book value. (R. 174 and 301).

[1]The books and records of all three Debtors were not current. In some instances they had not been posted for six months to one year. The Trustee arrived at the foregoing evaluations after reconstructing the books and records of the Debtors. See Report filed by the Receiver and the Trustee under Section 167(1) of the Bankruptcy Act—11 U.S.C.A. § 567(1) (R. 174 and 301).

[2]Representing in excess of sixty-four (64) percent of the authorized outstanding and issued capital stock.

The Dania Corporation was a holding company controlling 174,893[3] shares of the common stock issued by the Dania Bank, Dania, Florida, a state bank. These stockholdings were collateralized to repay an encumbrance of $5,631,288.17. As in the Lake Worth instance this indebtedness was created at the time of the acquisition of the stockholding. (R. 174 and 301).

Inasmuch as all of the stock held by The Dania Corporation in the Dania bank, and all of the stock held by The Lake Worth Company in the First National Bank in Lake Worth were collateralized and the indebtedness for which they were pledged were daily accruing interest charges it was apparent that the burdensome aspects of the bank stocks would have to be removed before The Wingreen Company could be rehabilitated. No reference is made to the management of both banks, but it can be stated, and the record reflects, that both banks had more than their share of bad loans.

The combined and consolidated assets were evaluated at $17,931,973.89, and the liabilities at $19,984,148.13. [Trustee's Report filed in accordance with Court's Order under Section 167(1) of the Bankruptcy Act—11 U.S.C.A. § 567(1)](R. 721).

There were in excess of nine hundred creditors, fifty of which claimed a secured status by virtue of agreements, chattel mortgages, real estate mortgages, chattel leases, retain titles, mechanics' liens and other statutory liens.

[3]Representing in excess of eighty (80) percent of the authorized, outstanding and issued capital stock.

Various and sundry creditors had filed Petitions to vacate the Orders of consolidation and to dismiss the respective Petitions, alleging failure of good faith. (R. 38 and 44).

Hearings were held on the motions addressed to the vacating of the Orders of consolidation and upon the issue of good faith as required by the statutes.

Finally, on May 23, 1966, the court entered its Order replete with minute findings of fact and conclusions of law approving the respective Petitions of the various Debtors for reorganization under Chapter X of the Bankruptcy Act. (R. 489). The court denied the motions to vacate the Order of Consolidation, found good faith, and appointed a Trustee and an attorney for the Trustee. (R. 419).

Upon his appointment the Trustee took an active daily part in the running of two motels, an office building, four apartment buildings, a warehouse building, vacant real estate, and was required to give his attention to the operation of two banks and keep the court advised accordingly.

The Trustee was eminently qualified. He is a retired vice president of Eastern Airlines and had considerable experience in financial and banking matters, which experience included serving as a bank director.

The Wingreen Company was indebted to both banks which were controlled by The Dania Corporation and The Lake Worth Company. On the other hand, the bank holding companies were both indebted to Wingreen when the latter advanced sums to the former so that the controlling stock interests in the banks could be purchased.

Among other difficulties The Wingreen Company, shortly prior to the filing of the original Petitions, completed the construction of a motel-restaurant complex in Gainesville, Florida by the utilization of temporary construction financing. It appears that the permanent financing could not be arranged and a number of mechanics' lien creditors filed their liens of record. Thus, the Trustee was required to preserve assets, operate businesses, supervise banks, and create order out of economic chaos.

Simultaneously, he was required to safeguard and manage properties so that their economic values would not be deterred or lessened, and lastly, he was required to reconstruct the financial records of the Debtors.

The Appellant is a first mortgagee holding a real estate mortgage on The Wingreen Company property in Cocoa Beach, Brevard County, Florida. This property is improved by a 173 room motel, a restaurant, a cocktail lounge, and a 16 unit apartment building. At the commencement of the proceedings the unpaid balance due and owing to the Appellant as reflected by the records of the Debtor and verified by the Appellant (J. H. Brock, as Receiver, had circularized all secured creditors requesting that they verify unpaid balances due and owing to them by The Wingreen Company) was established as $933,461.39 as to principal.

The secured indebtedness involving the stock held by The Dania Corporation was accruing interest at a daily rate, and had, in fact, accrued some $332,680.00 of

interest to the date of the sale of the stock. Thus, at the time the stock was sold the combined indebtedness as to principal and interest was $5,631,288.17. The principal indebtedness was owed to the Florida National Bank of Jacksonville, the Citizens National Bank of Orlando, the American National Bank of Jacksonville, the Inter National Bank of Miami, the United Securities Insurance Company, and Lexington Financial Corporation (Garvice D. Kincaid).

Based upon the financial statements of the Dania Bank and the examiners' reports it appeared that the 174,893 shares of the Dania Bank stock held by The Dania Corporation were evaluated far below the principal indebtedness for which said stock was pledged, to-wit: $5,298,608.17. The Trustee had managed, through court proceedings, to collect the dividends declared by the Dania Bank on all of the shares of stock registered in the name of The Dania Corporation.

Kincaid lodged two specific appeals, one was addressed to the refusal of the court to vacate the Order of Consolidation, and the other involved the finding of good faith.

The Trustee, after strenuous negotiations, convinced Kincaid to waive his rights to the dividends which Kincaid alleged were pledged to him, and to further pay to the Trustee $75,000.00 in cash for the Trustee's right, title and interest, whatever it may have been as Trustee of The Dania Corporation in and to 124,560 shares of the Dania Bank stock, or a total of $106,140.00. Kincaid further agreed to dismiss both appeals.

At the conclusion of the transaction, which was eventually approved by the court, the Trustee had available in excess of $100,000.00[4] as operating capital to safeguard and preserve the assets of The Wingreen Company, and unburdened the consolidated proceedings of an indebtedness in excess of $5,600,000.00[5].

A conclusion to be drawn from the record reflects that the Trustee through his efforts achieved a selling price far in excess of the value of the stock, and obtained cash receipts, which allowed the Trustee, by virtue of subsequent court orders, to preserve, safeguard and operate The Wingreen Company properties without subjecting said properties to any additional liens to secure certificates of indebtednesses. (Because of the status of the secured obligations of The Wingreen Company, if it were necessary to issue certificates of indebtedness these certificates would have been administrative charges of a first dignity).

The liquidation of the First National Bank in Lake Worth stock involved 45,050 shares. The book value of this particular asset, as reflected by capital, surplus and undivided profit on June 30, 1966, was evaluated at $35.74 a share. The Trustee effected a sale which netted the

---

[4]At that time the Dania Bank was being pressured to increase its capital contribution and surplus; the sources for these increases to be contributions from stockholders.

[5]At the completion of the complete liquidation of the 174,893 shares of Dania Bank stock the Trustee realized the sum of $118,723.24. It can be said without reservation that if the Dania Bank stock held by The Dania Corporation was liquidated in an open market there would have been no cash consideration realized by the Trustee in excess of the liens. The possibility existed that the total indebtedness secured by liens would not have been discharged.

estate $65.07 a share. While the Trustee only received $20,000.00 in cash, the estate was relieved of a secured principal indebtedness of $2,911,430.08. In addition thereto, the two appeals lodged by the Citizens National Bank of Orlando were dismissed, and a $500,000.00 claim was withdrawn as part of the consideration. The $20,000.00 was made available to the Trustee for purposes which are outlined hereinbefore in regard to the Dania Bank stock sale proceeds.

As a result of both sales the Trustee had available $138,723.24 for internal utilization.

In addition to the foregoing the Trustee recovered $22,393.84 which represented a security deposit held by the American Fire and Casualty Company. The Trustee further liquidated stockholdings of the Debtor in Crowder and Associates, Inc., an insurance agency, for the sum of $10,050.00 (the Crowder stock was actually issued to an officer of The Wingreen Company but the Trustee successfully established the stock as the property of The Wingreen Company and retained the proceeds of the sale).

The following is an enumeration of additional cash receipts handled by the Trustee for the periods involved.

May 24, 1966 - December 31, 1966, Income from operation of businesses under the Trustee's jurisdiction excluding dividends received Dania Bank stock	$1,674,755.98

Dividend Dania Bank stock — plus interest accrued thereto as of December 31, 1966	44,415.52[6]
January 1, 1967 - December 31, 1967 Income from operation of businesses under the Trustee's jurisdiction	2,613,028.81
January 1, 1968 - June 30, 1968 — Income from operation of the businesses under the Trustee's jurisdiction	843,662.42
February 29, 1968, proceeds of sale Ramada Inn, Gainesville, Florida	300,000.00
Proceeds of sale Biscayne Shores Apartments, furniture Cocoa Beach Apartments, Coral Gables property	49,003.00
Total	$4,524,865.73

It is further respectfully called to this Honorable Court's attention that the Trustee, at the time the last Petition for Interim Fees was considered by the trial court and dealt with by the opinions of the United States Court of Appeals for the Fifth Circuit, had further realized $191,000.00 as a result of action undertaken to recover voidable preferences.

[6]The sum of $138,723.24 includes the dividend paid by the Dania Bank on its stock in the amount of $44,415.52. The figure is not intended to be a duplicate computation.

The record was detailed and lengthy, but the United States Court of Appeals for the Fifth Circuit saw fit to require a printed appendix rather than to summarily decide the issue on the original record, and on two occasions granted Orders to diminish the record. (App. pp. 15 and 20) and on one occasion denied a motion to dismiss the appeal (App. p. 15). Not only did the Court direct that the record itself be diminished, it directed that the joint appendix be curtailed also. (App. p. 21).

The Fifth Circuit not being content with two diminutions of the record, proceeded on June 25, 1968 to again diminish the record (App. p. 23). Thus, in a proceeding that should have been summarily determined upon its original record, the United States Court of Appeals systematically depleted the record, and it was not in any position to fairly, adequately or correctly give weight to the services performed by the Trustee and his counsel. By the verbiage in the opinion itself, which establishes an hourly rate to be paid to the Trustee and his attorney, we find a clear usurpation of the trial courts' function.

Thus, the Fifth Circuit did, in effect, after diminishing the records, try the matter on an abbreviated record and did make and enter findings of fact and the establishment of fee, contrary to its jurisdiction.

Because of the systematic diminution of the record in Cause No. 25,303, your petitioner was required to prepare an appendix to his brief, in Cause No. 26,479 in an effort and an attempt to present portions of the record, which the court should have had summarily before it, however, by its previously entered orders these essential

portions of the record were lacking (App. p. 23). Thus, we find a record aborted systematically and an appellee who is required, in order to attempt to preserve the record, to appendix his brief, (R. Vol. VI, 1253). This in spite of the dictate of the Bankruptcy Act that the proceedings be summarily determined on the original record.

On two separate occasions the matter was argued before the United States Court of Appeals for the Fifth Circuit (R. 1254, 1255). The panel of the court presiding over the second argument ruled that it would act in harmony with the panel disposing of the matter as originally argued, and, therefore, of necessity, would enter its opinion and order giving due consideration to the conclusions reached by the panel disposing of the first appeal. Thus the petitioners were not afforded a complete evaluation of the value of the total services performed, neither of the two panels being fully cognizant of the overall picture which included many developments and services which were not made available to the court because of the diminution of the record.

Both of the Opinions rendered overlook and fail to cope with the amounts of the recoveries, the amount of cash handled, the amount of the assets, the uniqueness of the problems, the services performed and the achievements realized. The decisions only enumerate (erroneously) the hours expended and the sums received therefore, thus effectuating a discriminatory condition by enunciating a doctrine of payment for hours expended whether the same be mediocre or memorable.

REASONS FOR GRANTING THE WRIT

The provisions of the Bankruptcy Act dealing with appeals from orders refusing to make allowances of compensation or reinbursement in reorganization proceedings are clear, unambiguous and contain a Congressional dictate as to the mode in which they are to be conducted. The mandate requires that such proceedings shall be summarily heard upon the original papers [Section 250 of the Bankruptcy Act; 11 U.S.C.A. §650] and this Honorable Court has never had before it the exact and identical situation as to whether or not a United States Circuit Court of Appeals can, in face of these enactments, require the parties to substitute for the original papers a joint appendix and whether, by the exercise of its jurisdiction, require the parties to limit the contents of the joint appendix thereby circumventing the requirements of the statutes that such matters should be summarily heard upon the original papers. [*See Order of March 24, 1969—United States Court of Appeals Fifth Circuit taxing costs of printing joint-appendix, etc.*]

Thus this Honorable Court is called upon to interpret a Congressional statute never before decided by this Court involving the disposing of a material and vital procedural question. A question which should be disposed of to facilitate a uniformity in the application of the provisions of the Bankruptcy Act involving all of the United States Courts of Appeals.

The next element to create sufficient interest in granting the writ of certiorari appears to be a question involving an extension of the right to be heard on all matters in a proceeding under the reorganization pro-

visions of the Bankruptcy Act [Section 206 of the Bankruptcy Act; 11 U.S.C.A. §606]. It is conceded that the right to be heard, provided for by this particular section of the Bankruptcy Act, carries with it the right to lodge an appeal,[7] however; does this right extend to a party not materially and adversely affected by a judgment.

Does this particular subdivision of the Bankruptcy Act create a classification of appellate litigation which can be maintained by parties not adversely and materially affected by the ruling, thus creating a conflict within the basic realm of the Federal Statutes [28 U.S.C.A. §§ 1291 and 1292].

The Opinions themselves stand in direct contravention, not only with previous decisions in the United States Court of Appeals for the Fifth Circuit, but in conflict with the rule of law established in the United States Court of Appeals for the Second Circuit, the Seventh Circuit and the Ninth Circuit [**Ritchie Inc., v. Cheseborough-Ponds Inc.**, 2nd Cir. 1960, 281 Fed.2d 755; **In re, Michigan-Ohio Building Corp.**, 7th Cir. 1941, 117 Fed.2d 191; **Manda v. Sinclair** 5th Cir. 1960, 278 Fed.2d 629; **Mayer v. National Missile & Electronics**, 9th Cir. 1964, 326 Fed. 2d 401; in accord and approved Collier on Bankruptcy, 14th Ed., Vol. 6A p. 312].

---

[7]The obeservation of the United States Court of Appeals for the Fifth Circuit "The Trustee also urges that this court is without jurisdiction for the reason that Massachusetts Mutual Life Insurance Co. failed to obtain leave to appeal prior to the expiration of the time allowed within which to seek permission from the Circuit Court to Appeal." *Massachusetts Mutual Life Insurance Co. v. Brock, supra* at 431 and the conclusions reached are now moot in view of the Federal Rules of Appellate Procedure for the United States Courts of Appeals adopted December 4, 1967 and effective June 1, 1968. *See* Title 28 U.S.C.A. Rules-Federal Rules of Appellate Procedure-Rule 6, pg. 72.

This legal concept i.e., one may not appeal unless he has an interest which is direct, immediate and substantial and not a mere possible remote or unforeseen consequence is recognized by the Opinions[8]. The Opinions, therefore, recognize a deficiency in the application of its own theory which is in conflict with established legal principals, thus weakening the position of the application of the jurisdiction of the United States Court of Appeals for the Fifth Circuit in the matter.

Basically this Honorable Court is called upon to exercise its supervisory jurisdiction in an effort to aid the various and sundry United States Courts of Appeals to establish a uniformity of approach to several interrelated matters, i.e., does a Court of Appeals have jurisdiction to review an interim award of fees in reorganization procedures and if so, do the provisions of the Bankruptcy Act, or do the provisions of the Interlocutory Appeals Act, govern?[9]

Does this Court's supervisory jurisdiction permit it to correct an obvious error in an Opinion of a Court of Appeals so that the Opinion as corrected will conform to the record of the cause; and finally, can a United States Court of Appeals interject a "legal standard" as a justification for the exercise of its extra-judicial jurisdiction to enable it to try a matter, de novo, and in effect, substitute its findings of fact and conclusions of law for that of a trial court which did not commit clearly erroneous error, any mistake of law nor abuse its discretion.

---

[8]". . . Massachusetts Mutual is the holder of a first mortgage on one of the properties of the Wingreen Company, and its interest lies in the fact that the fees in question *may* result in the assessment of administrative costs against that property" (emphasis ours) *Massachusetts Mutual Life Insurance Co. v. Brock, supra* at 431.

[9]U.S.C.A. §650 as coupled with 28 U.S.C.A. 1291, and 1292.

The foregoing constitute severe questions, which if resolved by this Honorable Court, would go a long way towards creating a uniformity of approach amongst the various Circuit Courts of Appeals of the United States.

While Section 250 of the Bankruptcy Act [11 U.S.C.A. §650] does not mention interim awards of fees in reorganization proceedings and only makes reference to " . . . order making or refusing to make allowances of compensation or reimbursement, and may, . . . , be taken to and allowed by the Circuit Court of Appeals independently of other appeals in the proceeding, . . . "; must this particular language be read in harmony with the provisions of 28 U.S.C.A. §1291.[10]

The undersigned has not been able to find any cases which deal with this demarcation of jurisdiction other than the intimation by the United States Court of Appeals for the Third Circuit which indicated that appeals are to be dismissed because they are premature when they are lodged against interlocutory non-appealable[11] orders [**In re: Chotiner** 3rd Cir. 1914 218 Fed. 813.

---

[10]"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

[11]The Petitioner filed a Motion to Dismiss for lack of jurisdiction, and Motion to summarily determine the Appeal before the United States Court of Appeals for the Fifth Circuit. These motions were contained in the briefs submitted by the Petitioner-Appellee, pp. 1-6, Appellee's brief, United States Court of Appeals for the Fifth Circuit in Cause No. 25,303. This position was preserved in Cause No. 26,479 and 26,711. See Appellee's brief filed in Cause No. 26,479 and Order consolidating causes 26,479 and 26,711.

A reading of the Opinion[12] reveals that omitted therefrom are the tabulations of hours expended by the Petitioner, Brock, as Receiver, and his attorney, as attorney for the Receiver.

The record is clear that J. H. Brock, as Receiver expended 352.5 hours in this capacity, and the attorney for the Receiver expended 320 hours. Thus the hours expended for the period of time from February 8, 1966 - June 30, 1968 and the total compensation awarded were, in fact, as follows:

	Hours	$ Received	Hourly Rate
BROCK	2,767	109,080.00	$ 39.80
WOLFF	2,714.5	161,500.00	59.40
TOTAL		270,580.00	

This necessitates corrections in the Opinion to wit; the $45.00 hourly rate set forth in line 5, paragraph 2 of page 10 of the Opinion, should be corrected to read $39.80; and the $67.00 figure in line 3 of paragraph 3 on page 10 of the Opinion should be corrected to read $59.40.

Thus the figures in paragraph 2 and 3 on page 10 of the Opinion should be further reduced accordingly to the mathematical computations properly reflecting the true amount. Therefore, the conclusion contained in the Opinion that the fees earned involved a little more than one-half of the time (paragraph 3, page 10 of the Opinion) of both the Trustee and his attorney, should be corrected to eradicate the erroneous impression.

---

[12] 405 Fed.2d 429 at 434.

It would appear that this Court, within its broad supervisory capacity, would have the right to correct clear error contained in an Opinion of the United States Court of Appeals where there is a reliance upon an erroneous conclusion which is contrary to and unsupported by the record.

The court, in its Opinion, readily admits that the Reorganization Court did not commit any error in weighing the non-disputed facts. Thus, the facts as found by the trial court must be conceded as correct and true. The Opinion under consideration admits that the lower court did not commit error in the application of any doctrine of law to the non-disputed facts. However, it attempts to create an extraneous concept to support its conclusion that there was an abuse of discretion exercised by the District Court of a new basis by the introduction of a "legal standard", a new concept.

This is contrary to acceptable legal dogma and involves the placing of an unfounded limitation upon a trial court's use of its discretion. That an appellate court has power to review an exercise of judicial discretion is fundamental, however, such inquiry is limited to whether the action of the trial court was arbitrary in its failure to apply appropriate legal doctrines (not standard) to established undisputed facts. [**Young vs. Garrett,** 8th Cir. 1947, 159 Fed.2d 634].

Nowhere in the record can there be a showing of arbitrariness upon the part of the Reorganization Court, and the Opinion does not even intimate that there was. Hence, the application of a "legal standard" concept was baseless and the conclusions and deductions contained in the Opinion are contrary to acceptable legal dogma previously espoused by the courts. Thus, the Opinion con-

tains severe contradictions in the application of the law involved, and when these are compounded with the inadvertent mathematical errors therein contained, we are presented with an abuse of appellate jurisdiction, and instead of the true question, we have interposed a question of degree.

When the correction of the inadvertent mathematical computation contained in the Opinion[13] is made, we find that no problem of abuse of discretion exists, but rather one of degree and an appellate court will not be allowed to exercise an extra jurisdictional function, i.e. to become a trier of fact by the application of such shallow principals.

Degree is factual, and since nothing in the records show a misinterpretation of the facts, the appellate court cannot substitute its opinion as to degree for that of the trial court and dispose of the question as one of an abuse of discretion.

Thus, we find an insertion of a question of degree which is insufficient to permit an appellate tribunal to become a trier of fact.

This approach by the Fifth Circuit creates a difficulty and diversification of opinion amongst the various circuit courts. At least three circuit courts now stand in conflict with the Opinion under consideration.

---

[13]The Opinion erroneously establishes $67.40 per hour as the hourly rate earned by the attorney for the trustee. The proper mathematical calculation utilized and the proper number of hours involved indicate an hourly remuneration awarded by the District Court of $59.00. With the proper evaluation, the trustee's hourly rate is computed at $39.40 per hour instead of $45.10. Comparing the true allowances with fees set by the appellate court, we find the trustee was awarded $39.40 per hour by the trial court and $25.00 per hour by the appellate court. We further find that the attorney for the trustee was awarded $59.00 per hour by the trial court and $50.00 per hour by the appellate court. Hence, a question of degree.

The United States Court of Appeals for the Seventh Circuit has held that an appellate court may not try, *de novo*, the issue of reasonable compensation in reorganization proceedings; and the trial court's judgment will not be disturbed unless it clearly appears that there is no basis, in evidence, for the conclusion reached, or that the court proceeded on erroneous conceptions of the law [**In re; 32-36 North State Street Building Corp.**, 7th Cir. 1947, 164 Fed.2d 205].

The Eighth Circuit Court of Appeals held that where a circuit court of appeals reviews a fee award within the broad discretion of the bankruptcy court it does not attempt, nor will it try *de novo*, the issue of reasonable compensation [**Stein v. Hemker** 8th Cir. 1946, 157 Fed.2d 740].

The Ninth Circuit Court of Appeals ruled that where a district court possesses intimate knowledge of the day to day administration of an estate and has a familiarity of the course of the proceedings, it is inherent that such knowledge is particularly important to an accurate appraisal of services rendered; and where the findings as to the nature and value of the services are sufficiently specific, and not clearly erroneous, there is no jurisdiction in the appellate court to disturb the award. [**In re; West Coast Investors, Inc., Debtor**, 9th Cir. 1968, 388 Fed.2d 622].

The Ninth Circuit Court of Appeals clearly put the Opinion under consideration in direct conflict with its understanding of the law. That particular circuit court held, in a very recent case, that the issue in the review of fees allowed by the trial court is not whether the circuit court would have allowed the same sum as the trial court, or whether the court of appeals might con-

clude that it should have fixed a different fee, possibly larger, but that the basic test was whether or not the findings of fact, upon which the fee was based, were clearly erroneous [**Levitt v. Robinson** 9th Cir. 1968 402 Fed.2d 753; in accord with **Lungreen v. Freeman** 9th Cir. 1962, 307 Fed.2d 104 at 115; **Snider v. England** 9th Cir. 1967, 374 Fed.2d 717 at 720].

CONCLUSION

It appears that this Honorable Court's supervisory jurisdiction is urgently needed to establish, within the concepts of the statutes involved, a uniform procedure by laying down fundamental requisites to be followed uniformly by all the United States Courts of Appeal to effectuate a uniform administration of the Bankruptcy Act in the various circuit courts of appeals.

In addition, it is elementary that the conflicts which have been created amongst the various circuit courts of appeals should be eradicated so as to eliminate a growing chasm in the interpretation and application of the jurisdiction of the United States Courts of Appeals when invoked to review interim awards in reorganization proceedings.

Respectfully submitted,

IRVING M. WOLFF
Attorney for Petitioner
916 Biscayne Building
Miami, Florida

LIBRARY
SUPREME COURT. U. S.

No. 1224

FILED
APR 3 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term 1968

IN THE MATTER OF THE WINGREEN CO., ET AL

J. H. BROCK as trustee for the WINGREEN CO., a FLORIDA corporation; the DANIA CORPORATION, a FLORIDA corporation; and the LAKE WORTH CO., a FLORIDA corporation,

Petitioner,

vs.

The MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a MASSACHUSETTS corporation,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

IRVING M. WOLF
Attorney for the Petitioner
916 Biscayne Building
Miami, Florida

INDEX

	Page
Appendix A	App. 2
Appendix B	App. 13
Appendix C	App. 15
Appendix D	App. 17
Appendix E	App. 19
Appendix F	App. 21
Appendix G	App. 23
Appendix H	App. 25
Appendix I	App. 27
Appendix J	App. 29
Appendix K	App. 31
Appendix L	App. 39
Appendix M	App. 49
Appendix N	App. 63
Appendix O	App. 65
Appendix P	App. 67
Appendix Q	App. 69
Appendix R	App. 71

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1968

No. _____

IN THE MATTER OF THE WINGREEN CO., ET AL

J. H. BROCK as trustee for the WINGREEN CO., a FLORIDA corporation; the DANIA CORPORATION, a FLORIDA corporation; and the LAKE WORTH CO., a FLORIDA corporation,

Petitioner,

vs.

The MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a MASSACHUSETTS corporation,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

APPENDIX
A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 25,303

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY and COLLEGE INN, INC.,
Appellants,

vs.

J. H. BROCK, as Trustee of THE WINGREEN COMPANY, et al.,
Appellees.

Appeal from the United States District Court for the Southern District of Florida

---

(December 5, 1968)

Before THORNBERRY and SIMPSON, Circuit Judges and SUTTLE, District Judge.

SIMPSON, Circuit Judge: This appeal involves an objection by a creditor to the amount of the allowances by the District Court of interim fees to the trustee and

his attorney in a corporate reorganization under Chapter X of the Bankruptcy Act, 11 USCA, § 501 et seq. This appeal was allowed by the court under the authority of § 250 of the Bankruptcy Act, 11 USCA, § 650.[1] There is no merit the contention of appellee that the order in question was not appealable.

There is no merit in the contention of appellee that Massachusetts Mutual, a secured creditor, has not been adversely affected by the order in question and thus has no right to appeal. We hold that § 206[2] of the Act, 11 USCA, § 606, accords the right to maintain this appeal. Cf. **In re Keystone Realty Holding Co.**, 3 Cir. 1941, 117 F.2d 1003. See also 6A Collier on Bankruptcy (14th Ed.), ¶ 9.23(2). Massachusetts Mutual is the holder of a first mortgage on one of the properties of the Wingreen Company and its interest lies in the fact that the fees in question may result in the assessment of administrative costs against that property.

The trustee also urges that this court is without jurisdiction for the reason that Massachusetts Mutual failed to obtain leave to appeal prior to the expiration of the time allowed within which to seek permission from

---

[1] § 250 of the Bankruptcy Act, applicable in corporate reorganization proceedings under Chapter X provides:

"Appeal may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Title, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard from the original papers."

[2] § 206 in pertinent part:

"The debtor, the indenture trustee, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter . . . "

the circuit court to appeal. This is answered adversely to the trustee by the case of **Reconstruction Finance Corporation v. Prudence Securities Advisory Group**, 1941, 311 U.S. 582, 61 S.Ct. 333, 85 L.Ed. 367. The court here held that the appeal must be taken to the court of appeals within the time prescribed in 11 USCA, § 48 (a), but that it was not the fair intendment of § 250, supra, that the appeal must be allowed within that time.

There is thus no impediment whatever to our reaching the merits of this controversy: Whether the District Court abused its discretion in awarding the interim fees in question to the trustee and his counsel. We are constrained to the view that the awards were excessive under the facts and, as such, constitute an abuse of discretion.

The facts are of great importance in answering a question such as is posed here. There are three debtor corporations, The Wingreen Company, The Dania Corporation, and The Lake Worth Company, all controlled by the same individuals, and being interrelated as to indebtedness. Their petitions, filed on January 25, 1966, seeking to have their affairs reorganized under the Chapter X provisions, were consolidated.

The thrust of the reorganization proceedings is one of virtual liquidation. The Dania Corporation and The Lake Worth Company were holding companies, controlling shares of the capital stock of banks. These corporations have been liquidated and washed out for all practical purposes by the sale of the stocks to liquidate indebtedness, and to dispose of pending litigation. The Wingreen Company is in operation but on a much reduced basis. It

is a real estate holding company and its business consisted of acquiring real estate and developing the same by improving the parcels with apartment houses, office buildings and motels. The reorganization proceedings involved in excess of 900 creditors, with some 50 claiming secured status.

Mr. Brock was appointed receiver of the debtors on February 8, 1966 and Mr. Wolff was appointed attorney for the receiver. On May 23, 1966 the court approved the petitions for reorganization and appointed Mr. Brock as trustee and Mr. Wolff as attorney for the trustee. Mr. Brock is a retired vice president of Eastern Airlines while his counsel is an able lawyer having broad experience in the bankruptcy field.

This appeal involves the interim award of fees to the trustee and his counsel for the period September 1, 1966-December 31, 1966. Detailed statements of services rendered were filed with the court by the trustee and his counsel. These reflected that the trustee had spent a total of 396.5 hours on the affairs of the debtors during the period. He was awarded his requested fee, $20,000.00 or approximately $50.00 per hour. His counsel was awarded his requested fee of $25,000.00 for 222.5 hours or approximately $113.00 per hour.

There have been two previous interim fee awards from which no appeal was taken. They are pertinent to the question presented on this appeal. The entire picture must be assessed to the extent possible. Moreover, the District Court has consistently taken the position in these proceedings that all interim fee awards were to be considered in making the final award of fees and we think

that this is the proper approach. One of these previous awards was for services rendered by Mr. Brock as receiver and for his counsel as attorney for the receiver. These fees covered the period February 8, 1966-May 26, 1966. The receiver sought a fee of $15,000 for himself and $25,000 for his counsel. The receiver was awarded $12,500 for services entailing 352.5 hours or approximately $35.00 per hour. Counsel was awarded $20,000 for services of 320 hours or approximately $62.50 per hour. The other award was for the period May 24, 1966-August 31, 1966 when each was awarded his requested fee. The trustee was awarded $13,500 for services of 356.5 hours or approximately $37.00 per hour while counsel was awarded $12,500 for 174 hours or approximately $72.00 per hour.

Our relation of the awards to an hourly basis is not to imply that the District Court purported to use the time involved as anything more than one factor to be considered in arriving at the amount of the fees to be awarded. The court considered as other factors the complexity of the problems involved and the results obtained by the trustee and his counsel.

The District Court has a broad discretion in the award of fees. **Calhoun v. Hertwig,** 5 Cir., 1966, 363 F.2d 257; **Campbell v. Green,** 5 Cir., 1940, 112 F.2d 143. This discretion is not to be interfered with short of a showing that it has been abused. Such an abuse may stem from a factual basis or form the application of an improper legal standard. Our conclusion that the fees here in question are excessive results from a difference in view as to the applicable legal standard.

Our difference with the District Court is that we apply an additional factor: The public interest which is inherent in bankruptcy matters must be considered in

awarding fees. The object is to draw a balance to the end that competent trustees and counsel are obtainable in matters of this kind because of the knowledge that they will be fairly compensated. They must not and cannot expect, however, to be overcompensated for the court must exercise its discretion for the double purpose of fairly treating the trustee and his counsel while at the same time doing equity to the debtor and creditors. **Calhoun v. Hertwig,** supra, p. 261. The result likely to accrue to the debtor estate from the standpoint of overall value must also be given prime consideration in drawing the balance. A good statement of the problem is contained in **Finn v. Childs Co.,** 2 Cir., 1950, 181 F.2d 431, a reorganization proceeding where the appeal was from final allowances for trustee and counsel fees. The court contrasted ordinary litigation with a reorganization proceeding and said:

> "We have examined the applications for allowances of each of the parties involved here, with their detailed record of amount of time spent and the kind of work performed. We are not disposed to question the reasonableness of such fees by metropolitan practitioners for services of this kind when performed in the course of ordinary litigation. But in a reorganization proceeding, where the lawyers look for compensation to the debtor's estate which may belong, in equity, largely to others than those who have requested their services, they should have in mind the fact that the total aggregate of fees must bear some reasonable relation to the estate's value. Under these circumstances they cannot always expect to be compensated at the same rate as in litigation of the usual kind. . ."

The court then held that an award to the trustee whose overhead, as here, had been paid out of the estate, of $22.50 per hour, and to the law firm representing the trustee at the rate of $18.50 per hour was excessive. See also **Fox Markets, Inc. v. Ely,** 9 Cir., 1964, 337 F.2d 461; and **London v. Snyder,** 8 Cir., 1947, 163 F.2d 621.

With respect to the overall result and the total of the fees sought, we are fortunate in having facts and circumstances not in the record of this case which we may consider in addition to the prior awards. We judicially know from our own court records that interim fees for subsequent periods are being challenged. It is permissible for us to take these subsequent proceedings into consideration. **United States v. California Cooperative Canneries,** 1929, 279 U.S. 553, 555, 49 S.Ct. 423, 73 L.Ed. 838; **The Aspen Mining & Smelting Co. v. Billings,** 1893, 150 U.S. 31, 38, 14 S.Ct. 4, 37 L.Ed. 986. These subsequent awards and the appeals based thereon are pending in this court in two separate cases, No. 26,479 and No. 26,711, under the name and style of **Massachusetts Mutual Life Insurance Company v. Brock, as Trustee, etc.**

The record in No. 26,479 indicates that fees were awarded the trustee for the period January 1, 1967-June 30, 1967 in the amount of $27,500 at an hourly rate of approximately $45.00 for a total of 607 hours. Counsel was awarded $35,000 at the approximate rate of $89.50 per hour for 391 hours. In No. 26,711, the trustee was awarded $35,580. for 702 hours spent on the affairs of the debtors during the period June 30, 1967-June 30, 1968. For the same period his counsel was awarded $69,000 for 1,287 hours. No. 26,711 also involves an order wherein the District Court aggregated all of the interim fees awarded

to the trustee and his counsel (excluding the receivership) so that they averaged some $40.00 per hour for the trustee and $59.00 per hour for his counsel.

Taking all of these interim awards into consideration, including fees for the receivership, it appears that the total compensation awarded for the period February 8, 1966-June 30, 1968 was as follows:

	Hours	$ Received	Hourly Rate
Brock	2,414.5	$109,080	$45.1
Wolff	2,394.5	161,500	67.4
Total		$270,580	

We also know from the record in the case before us and from the records in the subsequent appeals that the liquidation of the debtor corporation is almost complete. As noted, Dania and Lake Worth have been virtually liquidated. The Wingreen Co. formerly owned and/or operated four motels, an office building, a warehouse building, and four apartment buildings. It also owned vacant lands. Most of these properties were heavily encumbered. All have now been liquidated or lost through sale or foreclosure or abandonment except the Ramada Inn at Cocoa Beach, Florida. That property is subject to first, second, third and fourth mortgages. The first mortgage is to secure a debt due appellant in excess of $1,000,000. The other three mortgages are to secure debts totaling $1,390,000, including interest, as of October 1, 1968. This property was appraised for appellant in 1966 as having a value of $1,500,000. The trustee has obtained an appraisal as of April 1, 1968 of $2,200.000.

According to a report filed by the trustee, the Ramada Inn was operated at a profit of only $50,900.88 during the first nine months of 1968. The same report shows that the trustee has unrestricted cash available of only $96,029.83 as of September 30, 1968.

The record discloses that the claims of unsecured creditors totaled $1,385,713.95 as of January 25, 1966. In discussing a proposed plan of reorganization, the trustee advised the court on December 30, 1966 that there were no stockholder equities to be dealt with and that "... there is little which the unsecured creditors may expect." We have found nothing in the records before us to indicate any change in this prognistication. The trustee hopes to realize something from a tax loss carry forward, subject to a ruling by the Internal Revenue Service. There is some tag end litigation which may produce assets for the debtors but what is realized, if anything, will not greatly exceed the administrative expenses.

It is apparent that the trustee and his counsel have rendered and are rendering valuable and almost daily services in connection with these Chapter X proceedings. These services have involved complex legal and business matters and we in no way disparage them. The fact remains, however, that they have been more than amply compensated for their services under the circumstances of these Chapter X proceedings.

The trustee, as previously stated, has received compensation for the period February 8, 1966-June 30, 1968, a period of some 29 months, in the amount of $109,080 free of overhead. His compensation has been at the hourly rate of $45.00. We conclude that this is excessive. The

trustee has been compensated for services taking little more than half his time at a rate of almost $50,000 per annum.

With respect to counsel, we hold that his fees are also excessive. He has been compensated at the rate of approximately $67.00 per hour during the same period. His total compensation has been $161,500 for little more than half time service or at a rate of more than $65,000 per annum. He is a sole practitioner and these services have been rendered entirely by him, and, of course, he has overhead expense.

There is opinion evidence before the court that the services of counsel were reasonably worth $50.00 per hour. There is some evidence that one Miami practitioner charges $80.00 per hour for his services in some matters and his view was that counsel for the trustee has been underpaid. There is no evidence as to the reasonable value of the services rendered by the trustee save his own statements. The absence of evidence, however, in fee matters is not a deterrent to the court of appeals reaching a conclusion that the fees were excessive. Judge Sibley speaking for this court in **Campbell v. Green**, supra, a case involving an appeal from orders allowing fees in a corporate reorganization, said with respect to the amount of fees to be awarded:

> "The court, either trial or appellate, is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of testimony of witnesses as to value..."

We conclude that the order under consideration must be reversed and the matter remanded to the District Court for reconsideration of the amounts awarded to the trustee and his counsel as fees. We conclude also that the fees to be awarded to the trustee shall not exceed $25.00 per hour for his services during the period covered by the order and that the fees to be awarded counsel for the trustee shall not exceed $50.00 per hour for the same period.

It is to be noted that the court is also this day reversing the orders complained of in No. 26,479 and No. 26,711, supra. The District Court will be in a better position to award fees upon considering the entire course of the proceedings than was the case in the several interim awards. In any event we do not believe fees above the stated amounts of $25.00 per hour and $50.00 per hour for the trustee and his counsel, respectively, can be justified for the services rendered under the circumstances of these Chapter X proceedings.

REVERSED and REMANDED with directions.

APPENDIX
B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26,479

In the Matter of: THE WINGREEN COMPANY
MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Appellant,

vs.

J. H. BROCK, Trustee,

Appellee.

No. 26,711

In the Matter of: THE WINGREEN COMPANY
MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Appellant,

vs.

J. H. BROCK, Trustee,

Appellee.

Appeals from the United States District Court for the Southern District of Florida

---

(December 5, 1968)

Before GEWIN, BELL and DYER, Circuit Judges.

PER CURIAM: These appeals involve orders allowing fees for the trustee and his counsel in Chapter X proceedings under the Bankruptcy Act for the periods January 1, 1967-June 30, 1967; June 30, 1967-June 30, 1968; and May 24, 1966-June 30, 1968. The appeals present the same questions as were presented in **Massachusetts Mutual Life Insurance Company v. Brock**, 5 Cir. 1968, ____ F.2d_____, [No. 25,303, slip opinion dated December ____, 1968]. The orders are reversed for the reasons stated in that case.

The District Court is directed to reconsider the request for fees for the stated periods. The order in No. 26,479, dated February 19, 1968, involves the period January 1, 1967-June 30, 1967. It so happens that the order in No. 26,711, dated August 6, 1968, involves the entire period of trusteeship (Receivership period excluded) through June 30, 1968. Thus it is that the fees for the period May 24, 1966-June 30, 1968, including the periods involved in No. 25,303 and No. 26,479 must be reconsidered. The facts and circumstances of these reorganization proceedings will not warrant the fees in excess of $25.00 per hour for the trustee and $50.00 per hour for counsel for this period.

REVERSED and REMANDED with directions.

APPENDIX
C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25,303

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, A Massachusetts Corporation,
and
COLLEGE INN, INC., a Florida Corporation,
Appellants,

versus

J. H. BROCK, as Trustee for the Wingreen Company, a Florida corporation; The Dania Corporation, a Florida corporation; and The Lake Worth Company, a Florida corporation,
Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

Before RIVES and DYER, Circuit Judges, and JOHNSON, District Judge.

BY THE COURT:

The joint petition for leave to take an interlocutory appeal from the orders of the United States District Court entered in the captioned cause is hereby GRANTED

The motion filed by appellees to dismiss the appeal is DENIED

The motion of appellants to require appellees to diminish their designation of the record on appeal is GRANTED

(original filed — June 15, 1967)

APPENDIX
D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25,303

MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY,
and
COLLEGE INN, INC.,
Appellants,

vs.

J. H. BROCK, as Trustee of
THE WINGREEN COMPANY, ET AL,
Appellees.

Appeal from the United States District Court for the Southern District of Florida

---

ORDER:

IT IS ORDERED that the joint motion of the parties to dispense with the printing of the record on appeal, in the above styled and numbered cause be, and the same is hereby granted upon the condition that the parties are directed to prepare and file a reproduced joint appendix of such portions of the record as relate to the issues to

be decided on appeal. Briefs shall be prepared and filed pursuant to Rule 24(a)(2) with the reproduced joint appendix to be filed within twenty (20) days after the filing of the brief of the appellee.

/s/WALTER P. GEWIN

United States Circuit Judge

(original filed — October 19, 1967)

APPENDIX
E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25,303

MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY
and
COLLEGE INN, INC.

Appellants,

vs.

J. H. BROCK, as Trustee of
THE WINGREEN COMPANY, ET AL,

Appellees.

Appeal from the United States District Court for the Southern District of Florida

---

Before TUTTLE, WISDOM and GEWIN, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellee to dismiss the above entitled and numbered cause for lack of jurisdiction be, and the same is hereby carried with the case.

IT IF FURTHER ORDERED that the motion of appellee to strike and correct the brief of appellant be, and the same is hereby DENIED.

IT IS FURTHER ORDERED that the motion of appellee to summarily determine the appeal be, and the same is hereby DENIED.

IT IS FURTHER ORDERED that the request of appellant for an order that the joint appendix be limited to the portions of the record which are related to matters which are directly referred to in the briefs of counsel be, and the same is hereby GRANTED.

(Original filed — February 2, 1968)

APPENDIX
F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25,303

MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY
and
COLLEGE INN, INC.,
Appellants,

vs.

J. H. BROCK, as Trustee of
THE WINGREEN COMPANY, ET AL,
Appellees.

Appeal from the United States District Court for the Southern District of Florida

---

Before RIVES, GEWIN and THORNBERRY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellant to strike certain items which have been designated by the appellee to be printed in the Joint Appendix in the above entitled and numbered cause be, and the same is hereby GRANTED provided that if at the time of the hearing of this appeal or thereafter it appears to the Court that anything material to either party is omitted from the Joint Appendix this Court on a proper suggestion or of its own initiative may direct that the omission shall be corrected by requiring the Clerk of the District Court to forward such necessary documents and papers to the Clerk of this Court; and if necessary, that a supplemental appendix or record shall be certified and transmitted by the Clerk of the District Court to this Court.

(Original filed — February 29, 1968)

APPENDIX
G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Misc. No. 1,006, 26,479

MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY,

Appellant,

vs.

J. H. BROCK, ETC., ET AL,

Appellees.

Appeal from the United States District Court for the Southern District of Florida

---

Before THORNBERRY, AINSWORTH and SIMPSON, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's suggestion and motion for the entry of an order to require the appellees to diminish the designations of contents of the record to be prepared on appeal, filed in the above styled and numbered cause, is hereby granted, the Court finding that the appellant's designations (together with the appendix printed in No. 25,303 pending herein) are sufficient for review of the questions involved on this appeal.

(Original filed — June 25, 1968)

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26,479

In the Matter of: THE WINGREEN COMPANY
MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY,

Appellant,

vs.

J. H. BROCK, Trustee,

Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

ORDER:

IT IS ORDERED that the petition of appellee to supplement the record filed in the above entitled and number cause be and the same is hereby granted.

/s/DAVID W. DYER

United States Circuit Judge

(Original filed — September 3, 1968)

APPENDIX
I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26,479

In the Matter of: THE WINGREEN COMPANY
MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY,

Appellant,

vs.

J. H. BROCK, Trustee

Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

ORDER:

IT IS ORDERED that the petition of appellant to supplement the record filed in the above entitled and numbered cause be, and the same is hereby granted.

/s/DAVID W. DYER

United States Circuit Judge

(Original filed September 3, 1968)

APPENDIX
J

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 66-28-Bk-WM

In the Matter of: THE WINGREEN COMPANY,
Debtor.

ORDER GRANTING LEAVE TO TRUSTEE TO SEEK A WRIT OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES ADDRESSED TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

This matter coming before this Court to be heard on the sworn Petition of J. H. Brock, Trustee of The Wingreen Company, a Florida corporation, the Dania Corporation, a Florida corporation, and The Lake Worth Company, a Florida corporation, and Irving M. Wolff, as his attorney, seeking this Court's approval for leave by said parties to prosecute in the Supreme Court of the United States a petition for certiorari addressed to the United States Court of Appeals for the Fifth Circuit, and further representing to this Court that these estates shall not be burdened with the expenditure of any expenses and costs in connection therewith, and it appearing that this order may be entered ex parte without notice, it is

ORDERED that J. H. Brock, as Trustee for The Wingreen Company, The Dania Corporation, and The Lake Worth Company, and Irving M. Wolff, as his attorney in said causes, be and they are hereby authorized in their

respective names and in their official capacities as Trustee and attorney for the Trustee for the respective estates, to prosecute a petition seeking a writ of certiorari in the Supreme Court of the United States addressed to the United States Court of Appeals for the Fifth Circuit in the following matters lately pending in said United States Court of Appeals for the Fifth Circuit, to wit: "Massachusetts Mutual Life Insurance Company, et al., v. J. H. Brock, Trustee, etc.", No. 25303, and the consolidated cases "Massachusetts Mutual Life Insurance Company, et al. v. J. H. Brock, Trustee, etc.", Nos. 26479 and 26779.

IT IS FURTHER ORDERED that all expenses and costs involved in said proceedings are to be borne by the respective J. H. Brock, Trustee, and Irving M. Wolff, and no administrative or other charge thereof shall be made to the respective estates in these proceedings.

IT IS FURTHER ORDERED that J. H. Brock as Trustee, and Irving M. Wolff, as attorney for the Trustee for said Debtors, shall not be paid, nor will they be entitled to be paid any fees in connection with the authorized litigation. It is the expressed intention that the instant estates shall not be burdened with any charges whatsover whether costs, expenses and fees, in connection with the proceedings authorized to be undertaken in the Supreme Court of the United States.

DATED at Miami, Florida this 16th day of January, 1969.

/s/W. O. MEHRTENS

United States Circuit Judge

APPENDIX K

[ORDER ENTERED January 30, 1967, United States District Court, Southern District of Florida; United States Court of Appeals, Fifth Circuit Cause No. 25303]

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

No. 66-28-Bk-WM
66-29-Bk-WM
66-30-Bk-WM

In the Matter of:
THE WINGREEN COMPANY,

Debtor.

In the Matter of:
THE DANIA CORPORATION,

Debtor.

In the Matter of:
THE LAKE WORTH COMPANY,

Debtor.

ORDER AWARDING ADDITIONAL INTERIM FEES TO THE TRUSTEE AND HIS ATTORNEY

On May 23, 1966, by Court Order, J. H. Brock was appointed Trustee for The Wingreen Company, a Florida corporation, Debtor; The Dania Corporation, a Florida corporation, Debtor; and The Lake Worth Company, a

Florida corporation, Debtor in these consolidated proceedings, and in accordance with this Court's Order of May 23, 1966 did qualify as Trustee by posting and bond required in the Order of appointment, and he has been, since May 24, 1966, and at all times pertinent thereafter, the duly acting and qualified Trustee of the three debtor estates in these consolidated proceedings.

This Court by its Order of May 24, 1966 did appoint Irving M. Wolff attorney for the said Trustee of the three Debtor corporations in these consolidated proceedings, and the said Irving M. Wolff did file the necessary affidavits required under the pertinent sections of the Bankruptcy Act, including Chapter X—corporate reorganization applicable, and since May 24, 1966, and at all times material herein, he has represented the said J. H. Brock, Trustee for the three Debtors in these consolidated proceedings as an attorney at law in accordance with the Order of his appointment.

The Trustee, J. H. Brock has filed his Petition for an award of additional interim compensation and reimbursement of disbursements in accordance with the applicable sections of the Acts of Congress relating to Bankruptcy, and in accordance with local Rule 10(g), Bankruptcy Rules of the District Court of the United States for the Southern District of Florida, for the services performed as Trustee for and on behalf of the three Debtors in these consolidated proceedings for the interval commencing with the date of September 1, 1966 to and including the 31st day of December, 1966.

Irving M. Wolff, the Trustee's attorney in these consolidated proceedings, representing the Trustee in his

capacity as Trustee of the three debtor estates, in accordance with the foregoing statutory and procedural citation, did also file his application for an award of additional interim attorney's fees for the same period of time involved as that included in the Trustee's Petition for compensation and reimbursement of expenditures.

It appearing from the record that due and sufficient notice of said hearing for the application of interim fees was given to all parties materially and adversely affected by these proceedings, and to such parties of record that this Court has designated as being entitled to receive copies of all pleadings, and subsequent to the notice two parties materially and adversely affected by these proceedings did file written objections to the Petitions filed by the Trustee and by the Attorney for the Trustee seeking interim fees for the period involved, said parties being Massachusetts Mutual Life Insurance Company, and College Inn.

Neither of the objectors did take into consideration the value of the services rendered by the Trustee and his attorney in connection with the complicated and difficult sale of the holdings of the Dania Corporation, a Debtor in these consolidated proceedings, specifically the stock in the Dania Bank. The liquidation of these particular assets resulted in a transaction in excess of $4,000,000.00 and resulted in the consolidated proceedings realizing in excess of $100,000.00 in cash.

The Court finds that the services rendered in this regard which commenced with an offer by the eventual purchaser whereby the consolidated estates would have been required to pay to the purchaser some $6,000.00 cul-

minated in a transaction as herinbefore observed, netting the estate not only the cash in excess of $100,000.00, but unburdened the estate of some $250,000.00 per year of interest charges, in addition to the dismissal of a complicated proceeding involving three Orders heretofore entered by this Court, which appeals properly defended would create sizeable administrative expenditures which the consolidated proceedings would have to bear. This savings must be considered sizeable when the Appellate record therefor prepared was stipulated to, and directions were submitted to the Appellate Court Clerk by Counsel for the intended Appellant and Trustee, which withheld instructions directing the Appellate Court Clerk to bind the record pending the negotiations involving the sale.

This Court further finds that the hourly expenditure of time is only one of the factors which governs an allowance of fees in reorganization proceedings. This is only an indication of time expended by the applicant. This factor alone is not the sole controlling item. The expenditure of time must be coupled with the results obtained. In these consolidated proceedings the Trustee has within his jurisdiction the management and operation of two motels, one office building, four apartment houses, a warehouse, and several parcels of unimproved property. At the inception of the proceedings the Trustee had the controlling stock interest of a national bank, and the controlling stock interest in a state bank within his custody.

In accordance with the reports filed by the Trustee under Section 167 of the Bankruptcy Act [11 U.S.C.A. § 567] the total evaluation of the consolidated estates

was in the neighborhood of $20,000,000.00, and the monthly reports filed by the Trustee reveal that the total gross annual business done by the properties in his custody and under his supervision on an annual basis grossed more than $3,000,000.00 per annum.

The Trustee is the sole executive under whose active management these properties are operated. The Court must take into consideration the executive ability of the Trustee, in addition to the hours expended, the monies the Trustee handles, and the dispatch in which decisions are made, and the activities of the Trustee in the preservation of the assets.

At the commencement of these consolidated proceedings, the records of the Debtors were in a deplorable condition. That through the efforts of the Receiver, J. H. Brock, now the Trustee, J. H. Brock, an efficient administrative system was created which allowed this Court to have at its disposal all of the necessary financial data and reports to assist this Court in making the decisions necessary in these complicated reorganization proceedings. It was through the efforts of this Trustee that the estate at the present time is in a position to be reorganized, and there are prospective investors who are interested in reorganization, and these investors have at their disposal because of the Trustee's efforts, detailed and minute financial information and information advising them as to the claims of all secured creditors and unsecured creditors. Where the secured creditors are involved, these people have available to them enumerations as to the types of liens on the specific properties, whether they be real or personal; they have available to them each facet that is necessary to allow them to make not only

a decision as to the possibility of participation in reorganization, but as to the future recapitalization of the facilities and assets to be utilized in reorganization.

At the commencement of these consolidated proceedings, there was little or no cash position available to the estates, and yet the Receiver, J. H. Brock, now the Trustee, J. H. Brock, through diligent application has discharged portions of the secured indebtedness, portions of the current taxes, and all of the operational expenses of the estate without the necessity of any borrowings, specifically no certificate of indebtedness having been issued by the Trustee to accomplish this facet of the administration.

This type and calibre of service must also be considered in the establishment of fees.

CONCLUSIONS OF LAW

That under the applicable provisions of the Bankruptcy Act dealing with reorganizations, this Court does have the jurisdiction to allow interim fees in accordance with the services rendered as they benefit the estate. It is therefore

ORDERED:

1. That the said J. H. Brock, as Trustee of the Wingreen Company, the Dania Corporation, and The Lake Worth Company, Debtors in these consolidated proceedings, be and he is hereby awarded $20,000.00 as allowance for compensation for the interim period commencing September 1, 1966 and concluding December 31, 1966, for

the said services so rendered during said period in these consolidated proceedings as Trustee of the hereinbefore enumerated Debtors.

2. That the enumerated disbursements as exhibited by Exhibit B attached to the Petition of the said J. H. Brock for reimbursement of out-of-pocket expenses as Trustee during the interval of September 1, 1966 through December 31, 1966 in the amount of $36.55 be allowed, and that said expenditures are approved as reported, and that they shall be taxed as administrative costs in these proceedings.

3. That Irving M. Wolff as attorney for the Trustee J. H. Brock, in these consolidated proceedings be and he is hereby awarded $25,000.00 for the legal services rendered by the said Irving M. Wolff in accordance with the Order appointing him under a general retainer as attorney for the said Trustee, J. H. Brock, in these consolidated proceedings, for the interim period commencing September 1, 1966 and terminating December 31, 1966.

4. The foregoing fees awarded to the Trustee and to his attorney in these consolidated proceedings are on an interim basis and such awards will be taken into consideration at the time of the final award of fees and compensation for the Trustee and his attorney in these consolidated proceedings.

5. That the said J. H. Brock, Trustee in these consolidated proceedings, prior to his payment and discharge of said awards, shall satisfy himself that all parties awarded compensation and allowance and reimbursement of costs have filed their respective affidavits as required by Section 249 of the Bankruptcy Act [11 U.S.C.A. § 649].

6. That the said Trustee, within twenty (20) days from the entry of this Order, shall mail a copy hereof to all creditors and stockholders of the said foregoing and enumerated Debtors in these consolidated proceedings as the same are reflected by the records of the said respective Debtors now in the possession of the said Trustee.

7. That all of the allowances for compensation and fees are for services rendered during the period set forth in the respective applications and hereinbefore provided for in this Order in conjunction with the administration of the instant Debtor estates in these consolidated proceedings, and that of said compensation allowances, fees and reimbursements for expenditures are reasonable and that the said awards are hereby allowed in payment on an interim basis for such services rendered, and the said Trustee, J. H. Brock, in these consolidated proceedings is hereby authorized to make the same.

DONE and ORDERED, at Miami, Florida, this 30th day of January, 1967.

/s/ W. O. MEHRTENS
UNITED STATES DISTRICT JUDGE

APPENDIX
L

[ORDER ENTERED February 19, 1968, United States District Court, Southern District of Florida; United States Court of Appeals, Fifth Circuit Cause No. 26479]

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 66-28-Bk-WM

66-29-Bk-WM

66-30-Bk-WM

In the Matter of:
THE WINGREEN COMPANY,

Debtor.

In the Matter of:
THE DANIA CORPORATION,

Debtor.

In the Matter of:
THE LAKE WORTH COMPANY,

Debtor.

ORDER AWARDING ADDITIONAL INTERIM FEES TO THE TRUSTEE AND HIS ATTORNEY

On May 23, 1966, by Court Order, J. H. BROCK was appointed Trustee for The Wingreen Company, a Florida corporation, Debtor; The Dania Corporation, a Florida corporation, Debtor; and The Lake Worth Company, a Florida corporation, Debtor, in these consolidated proceedings, and in accordance with this Court's Order of May 23, 1966 did qualify as Trustee by posting the bond required in the Order of appointment, and he has been, since May 24, 1966, and at all times pertinent thereafter, the duly acting and qualified Trustee of the three debtor estates in these consolidated proceedings.

This Court by its Order of May 24, 1966, did appoint IRVING M. WOLFF attorney for the said Trustee of the three Debtor corporations in these consolidated proceedings, and the said IRVING M. WOLFF did file the necessary affidavits required under the pertinent sections of the Bankruptcy Act, including Chapter X—corporate reorganization applicable, and since May 24, 1966 and at all times material herein, he has represented the said J. H. BROCK, Trustee for the three Debtors in these consolidated proceedings as an attorney at law in accordance with the Order of his appointment.

The Trustee, J. H. BROCK, has filed his Petition for an award of additional interim compensation and reimbursement of disbursements in accordance with the applicable sections of the Acts of Congress relating to Bankruptcy, and in accordance with local Rule 10(g), Bankruptcy Rules of the District Court of the United States for the Southern District of Florida, for the services performed as Trustee for and on behalf of the three Debtors in these consolidated proceedings for the interval commencing with the date of January 1, 1967 to and including the 30th day of June, 1967.

IRVING M. WOLFF, the Trustee's attorney in these consolidated proceedings, representing the Trustee in his capacity as Trustee of the three debtor estates, in accordance with the foregoing statutory and procedural citation, did also file his application for an award of additional interim attorney's fees for the same period of time involved as that included in the Trustee's Petition for compensation and reimbursement of expenditures.

It appearing from the record that due and sufficient notice of said hearing for the application of interim fees was given to all parties materially and adversely affected by these proceedings, and to such parties of record that this Court has designated as being entitled to receive copies of all pleadings, and subsequent to the notice one party materially and adversely affected by these proceedings did file written objections to the Petitions filed by the Trustee and by the Attorney for the Trustee seeking interim fees for the period involved, said party being MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY.

The objector did not take into consideration the value of the services rendered by the Trustee and his attorney in connection with the complicated and difficult litigation concerning the claims of liens involving the estates' interest in the Ramada Inn, Gainesville, Florida. This litigation was complicated and lengthy, and the estates' equity in the leasehold interest was enhanced by approximately $689,000.00, inasmuch as some sixteen claimants seeking a secured position against the estates' leasehold interest had their claims reclassified as unsecured claims. In addition thereto, the first mortgagee's claim as to principal was recommended for reduction by the Special Master by an amount of $173,000.00.

As a result of this particular litigation and the hearings conducted in connection with evaluation of secured claims under Section 197 of the Bankruptcy Act [11 U.S.C.A. § 597] it appears that a valuable asset of the estates was preserved to enable the Trustee to resurrect some consideration and to liquidate said asset so that the estates would resolve themselves into a reorganization of the remaining property in Cocoa Beach, Florida.

The objector presents no testimony or evidence to aid and assist this Court in reaching its determination. It does, however, attach an affidavit of a practitioner, and from the contents of said affidavit it does not appear that the said affiant is fully familiar with the proceedings or that he was given much time, nor is his conclusion as to the value of the services acceptable to the Court.

The Court has heard from counsel in these proceedings, and is fully familiar from its own experience with the matters and the complexity of the proceedings involved as to fully and completely evaluate the services rendered by the Trustee and his attorney.

While the objector makes a severe issue that no Plan of Reorganization has been proposed, and he erroneously concludes that no Plan of Reorganization will be proposed, this Court, because of its direct and minute supervision of the instant estates, is apprised of factual material which refutes the inferred conclusion of the particular objector.

The inconsistencies of the petition and the conclusions therein contained reveal that the objector is unfamiliar with the total ramifications of these proceedings.

While the objector complains that 1967 real and personal property taxes which are now due and owing have not been paid, and he does recognize that said expenses are an administrative matter, the objector fails to recognize that the fees earned by the Trustee and his attorney are also administrative expenses. It appears that this particular creditor feels that the administration of these instant estates should be for its sole benefit, and that anything that conflicts therewith should be stricken down.

It must be pointed out that the argument made by the objector as to the failure to file a Plan of Reorganization should have some effect upon the fees, the law is to the contrary, inasmuch as a trustee under the provisions of the Bankruptcy Act where reorganization is not affected, the provisions for remuneration of the Trustee are governed by the first seven chapters of the Bankruptcy Act [11 U.S.C.A. § 647].

The case law relied upon by the objector cites vintage cases (one case being decided in 1953 and the other in 1957, which do not give any consideration to the span of time and changing economic conditions).

This Court further finds that the hourly expenditure of time is only one of the factors which governs an allowance of fees in reorganization proceedings. This is only an indication of time expended by the applicant. This factor alone is not the sole controlling item. The expenditure of time must be coupled with the results obtained. In these consolidated proceedings the Trustee has within his jurisdiction the management and operation of two motels, one office building, four apartment

houses, a warehouse, and several parcels of unimproved property. At the inception of the proceedings the Trustee had the controlling stock interest of a national bank, and the controlling stock interest in a state bank within his custody.

The objector's conclusions to the contrary notwithstanding, the reports of the Trustee reflect that the annual gross business being done by the properties in his custody and his supervision has been increased for the period under consideration when compared to the previous period, particularly that as to the motels the operation of the business shows an increase of room sales of some 4,000 rooms over the same period of time involved in the preceeding year, and for the same period there was a gross revenue increase of some $34,000.00 when compared with the previous year. The Trustee's business policies resulted in considerable savings, and increased gross revenues and eliminated operating losses.

The Trustee is the sole executive under whose active management these properties are operated. The Court must take into consideration the executive ability of the Trustee, in addition to the hours expended, the monies the Trustee handles, and the dispatch in which decisions are made, and the activities of the Trustee in the preservation of the assets.

It is apparent that the attorney for the Trustee has been conscientious and has exhausted every avenue in handling the legal problems presented in the administration of these estates to safeguard every asset of these estates, and has kept the Court, as well as the Trustee, fully informed as to the legal developments with which the administration of the estates was faced.

The Court has reviewed the applications of the Trustee and his attorney for a further award of interim fees, and no creditor having filed any constructive objection to said application, nor put in issue any sworn allegation therein contained, the contents of both petitions must be taken to be factually correct, and as such are found to be so, and the facts therein contained are incorporated herein in **haec verba** as though fully set forth.

CONCLUSIONS OF LAW

This Court concludes as a matter of law that it has jurisdiction to allow interim fees in accordance with the services rendered, and in accordance with the doctrine established by the United States Court of Appeals for the Fifth Circuit, the Court recognizes from its own experience that it may form an independent judgment as to the value of fees in accordance with the services rendered and the achievements gained, with or without the aid of testimony of witnesses to establish said value [**Campbell v. Green**, 112 F.2d 143]. It is therefore

ORDERED:

1. That the said J. H. BROCK, as Trustee of The Wingreen Company, The Dania Corporation, and The Lake Worth Company, Debtors in these consolidated proceedings, be and he is hereby awarded $27,500.00 as allowance for compensation for the interim period commencing January 1, 1967 and concluding June 30, 1967, for the said services so rendered during said period in these consolidated proceedings as Trustee of the hereinbefore enumerated Debtors.

2. That the enumerated disbursements as exhibited by Exhibit B attached to the Petition of the said J. H. BROCK for reimbursement of out-of-pocket expenses as Trustee during the interval of January 1, 1967 through June 30, 1967 in the amount of $74.60 be allowed, and that said expenditures are approved as reported, and that they shall be taxed as administrative costs in these proceedings.

3. That IRVING M. WOLFF, as attorney for the Trustee J. H. BROCK in these consolidated proceedings, be and he is hereby awarded $35,000.00 for the legal services rendered by the said IRVING M. WOLFF in accordance with the Order appointing him under a general retainer as attorney for the said Trustee, J. H. BROCK, in these consolidated proceedings, for the interim period commencing January 1, 1967 and terminating June 30, 1967.

4. The foregoing fees awarded to the Trustee and to his attorney in these consolidated proceedings are on an interim basis and such awards will be taken into consideration at the time of the final award of fees and compensation for the Trustee and his attorney in these consolidated proceedings.

5. That the said J. H. BROCK, Trustee in these consolidated proceedings, prior to his payment and discharge of said awards, shall satisfy himself that all parties awarded compensation and allowance and reimbursement of costs have filed their respective affidavits as required by Section 249 of the Bankruptcy Act [11 U.S.C.A. § 649].

6. That the said Trustee, within twenty (20) days from the entry of this Order, shall mail a copy hereof to all creditors and stockholders of the said foregoing and enumerated Debtors in these consolidated proceedings as the same are reflected by the records of the said respective Debtors now in the possession of the said Trustee.

7. That all of the allowances for compensation and fees are for services rendered during the period set forth in the respective applications and hereinbefore provided for in this Order in conjunction with the administration of the instant Debtor estates in these consolidated proceedings, and that of said compensation allowances, fees and reimbursements for expenditures are reasonable and that the said awards are hereby allowed in payment on an interim basis for such services rendered, and the said Trustee, J. H. BROCK, in these consolidated proceedings is hereby authorized to make the same.

DONE and ORDERED, at Miami, Florida, this 19th day of February, 1968.

/s/ W. O. MEHRTENS

UNITED STATES DISTRICT JUDGE

APPENDIX M

[ORDER ENTERED August 6, 1967, United States District Court, Southern District of Florida; United States Court of Appeals, Fifth Circuit Cause No. 26711]

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

No. 66-28-Bk-WM
66-29-Bk-WM
66-30-Bk-WM

In the Matter of:

THE WINGREEN COMPANY,

Debtor.

ORDER AWARDING ADDITIONAL INTERIM FEES TO THE TRUSTEE AND HIS ATTORNEY

On May 23, 1966, by Court Order J. H. BROCK was appointed Trustee for The Wingreen Company, a Florida corporation, Debtor.

He was also appointed Trustee for the Dania Corporation, and The Lake Worth Corporation, also Florida corporations. The proceedings were consolidated. However, heretofore this Court has entered Orders awarding interim allowances to the Trustee and his attorney, and it further did enter an Order apportioning the respective

administrative charges amongst the various estates and the necessary payments were made and credits and debits achieved amongst the respective estates.

This Court is fully advised as to the status of the causes, the interrelationship of the estates, and the services rendered. The record reflects that the Trustee did post bond and qualify for his office on May 24, 1966, and at all times pertinent thereafter he was the duly qualified and acting Trustee, in accordance with the Order of this Court in these proceedings.

On May 24, 1966, this Court by its Order of instant date did appoint IRVING M. WOLFF attorney for the said Trustee in these consolidated matters.

The record further reflects that the Trustee and his attorney have made an application for interim fees for the entire period of time of their appointment, and did file the necessary affidavits required under the pertinent sections of the Bankruptcy Act, including Chapter X corporate reorganization provisions, and that at all times material herein, the said IRVING M. WOLFF did represent the Trustee J. H. BROCK and did perform the necessary services.

The Trustee, J. H. BROCK, has filed his Petition for an award of interim compensation asking that this Court review from the date of his appointment, May 24, 1966, to and including the 30th day of June, 1968, the status of interim allowances heretofore made to the Trustee and credit said interim allowances to any interim fees which this Court may award for the entire period of the trusteeship, and should any deficiency appear in the payment of said fees, enter an Order accordingly.

IRVING M. WOLFF, the Trustee's attorney in these proceedings, did also file a similar Petition and both applications are accompanied by the required Affidavits under the Bankruptcy Act and Local Rule 10C, Bankruptcy Rules of the United States for the Southern District of Florida. The Petitions were duly and properly served on all parties adversely affected under the date of July 18, 1968, in accordance with the Certificate of Service filed in these proceedings by the Trustee and countersigned by his attorney.

The notice given was adequate and in accordance with this Court's rulings.

The record reflects that the Trustee did expend 2,414 hours and 30 minutes, and the Trustee did take into his possession assets evaluated at $17,931,973.89. That at the present time he retains possession of assets evaluated at $2,200,000.00. That in addition to the foregoing assets, the Trustee has in the disposition of the business of the estates handled $6,154,708.63 from the date of his appointment as Trustee to and including June 30, 1968. That $502,664.84 represented proceeds from disposals of debtor's assets which in effect were utilized in the administration of the estates, enabling secured creditors to have their secured status maintained and protected, and to further afford unsecured creditors the possibility of participation in distribution in reorganization. It thus appears that the Trustee did handle in excess of $23,000,000.00 in assets and cash during his administration.

By previous Order of Court, the Trustee has been awarded $61,000.00 for and on account of interim fees for services rendered in these proceedings as Trustee. This

Court has made no allowance to the Trustee for the period commencing with July 1, 1967 and ending June 30, 1968, a period in which the Trustee expended 1,054 hours and 30 minutes of the 2,414 hours and 30 minutes expended during the entire progress of these proceedings.

The Court is of the opinion that the value of the services rendered by the Trustee in these proceedings should be established on the basis of an hourly award involving the time expended, but that this award should also take into consideration the extraordinary responsibilities and the ability displayed by the Trustee in the management and conduct of the affairs of the said debtors and bringing order out of chaos. This Court has by its previous orders made observations as to the ability of the Trustee and the achievements that he has attained in the services rendered to this estate as an officer of this Court.

The attorney for the Trustee has filed his sworn Petition to which are attached minute schedules of the time expended by the attorney for the Trustee from the date of his appointment as such attorney to and including June 30, 1968. These schedules so filed and the testimony rendered reflect that the attorney for the Trustee has expended, since his appointment to and including said 30th day of June, 1968, 2,394 hours and 30 minutes, and he has received an interim allowance of fees for and on account of said services of $72,500.00. No award has been made for interim fees to the attorney for the Trustee for the period commencing July 1, 1967 and ending June 30, 1968, during which period of time the attorney for the Trustee did expend 1,605 hours and 15 minutes in these proceedings.

The Court is full well familiar with the services performed by the attorney for the Trustee and has commented on said services in the previous allowances for interim fees in these proceedings. The attorney for the Trustee has alleged in his sworn Petition that he did expend 95% of his time on matters of these estates during the period commencing January 1, 1967, to and including June 30, 1968. His practice has been limited because he is a single practitioner and due to the press of duties involved as attorney for the Trustee of the instant estates, he has discouraged and refused to take matters which have been tendered to him, thereby of necessity curtailing his practice. The Court must recognize also that the attorney for the Trustee, in the maintenance of his office, experiences an overhead.

A review of the application of the attorney for the Trustee reflects that he seeks to have established an hourly charge from the commencement of the appointment to and including June 30, 1968, and to award interim fees on the basis of said hourly rate and to credit against said figure any and all previous interim allowances heretofore made to the attorney for the Trustee. That should there be any deficiencies due and owing to the said attorney for the Trustee in accordance with said formula, then this Court shall enter such necessary Orders as it deems proper in its discharge of the said matter.

The record reflects that the attorney for the Trustee is now defending four appeals in the United States Court of Appeals for the Fifth Circuit. That he has matters of complicated nature involving the Internal Revenue Service of the United States of America before this Court in order to determine availability to a reorganized company

of various and divers tax losses under the tax loss carry forward provisions of the Internal Revenue Code. That he has plenary and/or summary lawsuits in progress to recover void or voidable preferences in an amount in excess of $600,000.00. That he further has had matters involving the obtaining of testimony from hesitant witnesses, and that he has exhausted every avenue in the handling of legal problems presented in the administration of the estates to safeguard every asset of the estates, and has kept the Court, as well as the Trustee, fully informed as to the legal developments with which the administration of the estates has been faced. In addition thereto, a Plan of Reorganization has been promulgated and presented to the Court, and the Court has directed the same to be forwarded to the Internal Revenue Service of the Treasury Department of the United States of America for its opinions.

Massachusetts Mutual Life Insurance Company filed objections to the last application made by the Trustee and his attorney for interim remuneration, and the Trustee filed a motion to strike portions of said objections, which motion was disposed of by an independent ruling entered by this Court.

The Trustee introduced testimony as to the reasonableness of his attorney's fees, calling to the witness stand an eminent practitioner before the courts of the State of Florida and the United States District Court for the Southern District of Florida, a past president of the local Bankruptcy Committee of this Court, senior partner of the law firm of Jepeway & Gassen, the Honorable LOUIS M. JEPEWAY. This witness testified that within his experience in bankruptcy proceedings, which dated

back to 1931, that a reasonable interim allowance for the attorney for the Trustee for the services rendered in a highly complicated and difficult administration during the interim period under consideration would be a minimum fee of $175,000.00 and a maximum of $200,000.00, based upon the size of the estates, the complexity of the matters and problems, the success in achieving ultimate ends, and the conscientious and direct effort expended by the attorney for the Trustee, in addition to the loss of practice sustained by said attorney because of his representation of the Trustee in this matter. Mr. JEPEWAY further testified to the methods utilized by attorneys in Dade County, Florida in setting fees and as to what the standards were. Mr. JEPEWAY, in his examination and cross examination, confirmed much of the independent judgment of the Court within its experience as to the setting of fees and as to the value in accordance with the services rendered and the achievements gained.

The objector presented no testimony other than the hereinbefore referred to objections and the alluded to rulings upon said objections.

This Court recognizes from the record that since July 1, 1967, the Trustee has either disposed of or abandoned under Order of this Court the following properties:

BANYAN ARMS APARTMENTS (August 30, 1967);

SUNNYBROOK APARTMENTS (September 20, 1967 — Condemnation)

BISCAYNE SHORES APARTMENTS (February 14, 1968)

RAMADA INN, GAINESVILLE (February 29, 1968)

THE LISCHKOFF PROPERTY — PENSACOLA (March 11, 1968)

THE HALLMARK PROPERTY — PENSACOLA (April 8, 1968)

THE COCOA BEACH 32-UNIT APARTMENTS (March 22, 1968)

THE EDGEWATER BUILDING (May 1, 1968)

THE GRAY PROPERTY — (May 3, 1968)

THE CORAL GABLES PROPERTY (May 10, 1968)

The Court does further recognize from the record, as hereinbefore stated, that the Trustee at the present time is engaged in prosecuting summary and plenary suits seeking to recover sums in excess of $600,000.00, and that in preparation for said proceedings a substantial amount of testimony and exhibits have been adduced under Sections 7a and 21a of the Bankruptcy Act, and by depositions. That the Trustee's paramount duty is one of total administration of all of the assets of the estate and preservation of choses in action, and each and every right of the estate. That the Trustee's duties cannot be minimized by the irresponsible conclusion contained in the objections filed by Massachusetts Mutual Life Insurance Company that the said Trustee is "a super manager". Such a conclusion reflects that the pleader is not fully and completely familiar not only with these proceedings but with the duties imposed upon a reorganization Trustee by the Bankruptcy

Act. Comment on this portion of the objections filed by Massachusetts Mutual Life Insurance Company cannot be concluded prior to the Court's making an additional observation that the said objector seeks to create the impression that the Trustee had little or nothing by way of property management to do, and therefore the Court has hereinbefore set forth the duties of liquidations of assets held by the Trustee in accordance with this Court's Orders. It does further appear that the objector is not cognizant of the impending proceedings directed to the Secretary of the Treasury to aid and assist this Court by rendering an opinion concerning the tax loss carry forward which the Debtor has available in relation to the Plan of Reorganization as submitted to this Court. This tax-loss carry forward at the present time is an asset in excess of $2,500,000.00, and the salvaging of all or any part thereof within the intended Plan of Reorganization is important in the administration of this estate.

These are some of the matters which this Court has actual knowledge of because of its minute supervision and surveillance of the proceedings. It appears that the objections filed are not well taken; in view of the fact that no witness was presented and no testimony offered, said objections can only be classified as a bargaining argument.

This Court has, by previous Order, made an allocation of administrative charges amongst the consolidated estates; however, because of the interrelationship of the consolidated matters, while each estate has borne its respective share of the interim fees heretofore awarded, the Court considers the total dollar sums heretofore allowed and will credit said sums as to any and all allowances made for the period involved, as set forth in the applications filed for interim fees.

While the attorney for the Trustee seeks compensation upon an hourly rate in connection with the number of hours expended—specifically 2,394 hours and 30 minutes, and the Trustee seeks remuneration for the expenditure of 2,414 hours and 30 minutes, which expenditure of time this Court finds uncontradicted by any legally sufficient evidence, this Court has insisted that while the number of hours expended is a factor in determining fees, it is not the sole and exclusive factor. The Court, while taking said factor into consideration, does reiterate that the Court has examined the entire record of services performed by both the Trustee and his attorney, and being full well familiar with these proceedings, does take into consideration in establishing the Trustee's interim fee his executive ability, his organizational ability, his direction of the affairs and business of the estates, his decisions and recommendations to this Court concerning liquidations and salvaging of properties, the interfinancings which precluded and prevented the issuance of Certificates of Indebtedness further encumbering the etates but still enabling the estates through internal financing to maintain an economic semblance in their administration. The Court recognizes on behalf of the Trustee and his attorney their ingenuity and their diligence and successes, and presentment to the Court and the parties materially and adversely affected of a complete and understandable kaleidoscopic picture of the financial affairs of the Debtors. This Court feels that by virtue of the status of the record and the accomplishments achieved and the time expended by the Trustee and his attorney that any award made at the present time on an interim basis could only be classified as reasonable and not in accordance with the true value of the services performed.

It appears that Massachusetts Mutual Life Insurance Company has constantly reiterated and expressed a fear, unwarranted by the record and unsupported by these proceedings, that the secured creditors, of which it is one, will be taxed and be required to pay and discharge at least on a prorata basis, administrative costs in the nature of the Trustee's fees and the attorney for the Trustee's fees. This assumption is not supported by the record, the facts in the matter, the applications made, or the law involved.

It further appears from the record that due and sufficient notice of hearing for the application for interim fees for the period involved was given to all parties materially and adversely affected by these proceedings, and to such parties of record as this Court has designated as being entitled to receive copies of all pleadings, and the Court being fully advised in the premises, having reviewed the record of the proceedings for the interval of time for which the attorney and the Trustee seek compensation and fees for service rendered, and it further appearing that this Court has jurisdiction over the parties and the subject matter to enter the hereinafter Order, it is thereupon

ORDERED:

1. That the said J. H. BROCK, as Trustee of the estates in these consolidated causes, be and he is hereby awarded interim compensation in the amount of $96,580 for the period commencing May 24, 1966 and concluding June 30, 1968, and that he has been awarded for and on account of said services the sum of $61,000.00, and that therefore there is further interim allowance due and owing to the said Trustee, J. H. BROCK in the amount of

$35,580 as allowance of compensation for the interim period commencing May 24, 1966 and concluding June 30, 1968, for the said services so rendered during said period in these proceedings.

2. That IRVING M. WOLFF, as attorney for the Trustee J. H. BROCK, be and he is hereby awarded interim compensation in the amount of $141,500 for legal services rendered by said IRVING M. WOLFF in accordance with the Orders appointing him under a general retainer as attorney for the said Trustee, and that he has received as a partial allowance of said legal services the sum of $72,500.00, and that therefore there is presently further interim allowance due and owing to the said attorney for the Trustee, IRVING M. WOLFF, in the amount of $69,000 as allowance of compensation for the interim period commencing May 24, 1966 and concluding June 30, 1968, for the said services so rendered during said period in these proceedings.

3. Nothing herein contained shall modify, alter, or amend this Court's Order of May 3, 1968 entitled "ORDER APPORTIONING ADMINISTRATIVE COSTS AND TAXING THE SAME", apportioning administrative claims amongst the consolidated estates and all allowances made for services rendered by the Trustee and the attorney for the Trustee; however, the interim fees herein awarded are taxed against and are to be borne by the Wingreen estate solely.

4. The foregoing fees awarded to the Trustee and to his attorney in these consolidated proceedings are on an interim basis and such awards will be taken into consideration at the time of the final award of fees and compensation for the Trustee and his attorney in these consolidated proceedings.

5. That the said J. H. BROCK, Trustee in these consolidated proceedings, prior to his payment and discharge of said awards, shall satisfy himself that all parties awarded compensation and allowance and reimbursement of costs have filed their respective affidavits as required by Section 249 of the Bankruptcy Act [11 U.S.C.A. § 649].

6. That the said Trustee, within twenty (20) days from the entry of this Order, shall mail a copy hereof to all creditors and stockholders of the said foregoing and enumerated Debtors in these consolidated proceedings as the same are reflected by the records of the said respective Debtors now in the possession of the said Trustee.

7. That all of the allowances for compensation and fees are for services rendered during the period set forth in the respective applications and hereinbefore provided for in this Order in conjunction with the administration of the instant Debtor estates in these consolidated proceedings, and that all of said compensation, allowances, fees and reimbursements for expenditures are reasonable and that the said awards are hereby allowed in payment on an interim basis for such services rendered, and the said Trustee, J. H. BROCK, in these consolidated proceedings is hereby authorized to make payment in the amount of $35,580 to the said Trustee, J. H. BROCK and $69,000 to Irving M. Wolff as attorney for the Trustee, as hereinabove provided.

DONE and ORDERED, at Miami, Florida, this 6 day of August, 1968.

/s/ W.O. MEHRTENS

UNITED STATES DISTRICT JUDGE

APPENDIX
N

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1967

No. 25,303

D.C. Docket Nos. BK 66-28, 66-29 and 66-30 Wm
(Consolidated)

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY and COLLEGE INN, INC.,

Appellants,

versus

J. H. BROCK, as Trustee of THE WINGREEN COMPANY, ET AL.,

Appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before THORNBERRY and SIMPSON, Circuit Judges and SUTTLE, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order appealed from in this cause be, and the same is hereby, reversed, and that this cause be and the same is hereby remanded to the Said District Court with directions, in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, J. H. Brock as Trustee of The Wingreen Company, and others, be condemned, in solido, to pay costs of this cause in this Court for which execution may be issued out of the said District Court.

December 5, 1968.

Issued as Mandate: Jan. 31, 1969.

A true copy
Edward W. Wadsworth,
Clerk U. S. Court of Appeals, Fifth Circuit.

By_____
Deputy

Jan. 31, 1969
New Orleans, Louisiana.

APPENDIX O

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1968

No. 26,479

D. C. Docket No. BK 66-28-WM

In the Matter of:

THE WINGREEN COMPANY
MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY, Appellant,
versus
J. H. BROCK, Trustee Appellee.

No. 26,711

In the Matter of:

THE WINGREEN COMPANY
MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY, Appellant,
versus
J. H. BROCK, Trustee Appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before GEWIN, BELL and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the records from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the orders appealed from in this cause be, and the same are hereby reversed, and that this cause be, and the same is hereby remanded to the said District Court with directions, in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellee, J. H. Brock, Trustee, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

December 5, 1968.

Issued as Mandate: Jan. 31, 1969.

A true copy
Edward W. Wadsworth,
Clerk, U.S. Court of Appeals, Fifth Circuit.

By_____
Deputy

Jan. 31, 1969
New Orleans, Louisiana.

APPENDIX
P

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25,303

In the Matter of:
THE WINGREEN COMPANY
MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY,

Appellant,

versus

J. H. BROCK, Trustee

Appeals from the United States District Court for the Southern District of Florida.

(January 6, 1969)

ON PETITION FOR HEARING

Before THORNBERRY and SIMPSON, Circuit Judges, and SUTTLE, District Judge

PER CURIAM:

IT IS ORDERED that the petition of appellee Brock in the above entitled and numbered cause be and the same is hereby DENIED.

U. S. Court of Appeals
FILED
January 6, 1969
Edward W. Wadsworth,
Clerk

APPENDIX
Q

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26,479

In the Matter of:
THE WINGREEN COMPANY
MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY,

Appellant,

versus

J. H. BROCK, Trustee,

Appellee.

No. 26,711

In the Matter of:
THE WINGREEN COMPANY
MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY,

Appellant,

versus

J. H. BROCK, Trustee,

Appellee.

Appeals from the United States District Court for the Southern District of Florida

---

(January 15, 1969)

ON PETITION FOR REHEARING

Before GWEN, BELL and DYER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition of appellee Brock for rehearing in the above entitled and numbered causes be and the same is hereby DENIED.

Entered nunc pro tunc as of January 6, 1969, this 15th day of January, 1969.

APPENDIX
R

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 25,303
No. 26,479
No. 26,711

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Appellant,

vs.

J. H. BROCK as Trustee of THE WINGREEN COMPANY, et al.

Appellee.

MOTION TO TAX COSTS

The Appellant, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, by and through its undersigned attorneys, moves this Honorable Court, pursuant to FRAP 39, to tax costs against the Appellee, J. H. BROCK, as Trustee of The Wingreen Company, and in support thereof shows unto the Court as follows:

1. On December 5, 1968 this Honorable Court entered its opinion reversing the order of the United States District Court for the Southern District of Florida dated Feb-

ruary 19, 1968 and ordered the reduction of the fees awarded to the Trustee to $25.00 an hour and the fees awarded to the attorney for the Trustee to $50.00 an hour. Thereafter the Appellee filed a Petition for Rehearing and on January 6, 1969 this Honorable Court denied the Petition for Rehearing.

2. Subsequent fee appeals were taken in Case No. 26,479 and No. 26,711 and on December 5, 1968 this Honorable Court entered its Order directing the District Court to reconsider the request for fees in accordance with the opinion in Case No. 25,303, and stated:

> "The facts and circumstances of these reorganization proceedings will not warrant the fees in excess of $25.00 per hour for the trustee and $50.00 per hour for counsel for this period."

3. Thereafter, this Court entered its opinion on January 15, 1969 nunc pro tunc as of January 6, 1969 denying the petition of the Appellee Brock for rehearing in Case No. 26,479 and Case No. 26,711. After receiving a copy of the notice that the Petition was denied on January 16, 1969, the Appellant requested the court reporter who had printed the record on appeal and the Review Printing Company, to send him copies of their itemised statement of their costs for their services showing the amount paid per page so that the Appellant could proceed to tax costs in accordance with the opinion of this Court. Because of the work load of both George E. Ahern, and the Review Printing Company there was a delay in receiving a return of the requested information. The Appellant has now received this information regarding the costs of the briefs and the record, which is required by Rule 39 which became effective on July 1, 1968, and which sets forth the uniform procedure in the various Circuits for taxing costs.

4. While the Appellant was in the process of obtaining the costs information to comply with Rule 39, it received a letter of transmittal dated January 31, 1969 from the Clerk of this Honorable Court directed to the Clerk of the United States District Court enclosing a certified copy of the judgment of this court, issued as and for the mandate, together with a copy of the opinion. The letter proceeded to state that incorporated on the judgment is a detailed statement of the costs in this Court, as follows: "Docketing cause, etc., . . . $25.00 recoverable by appellants from appellees."

5. Since the parties were the same in all three of these fee appeals, involving the same Chapter 10 Reorganization case, Appellant is setting forth all of the costs involved in the three appeals in this one Petition.

The costs involved in Case No. 25,303 are as follows:

A. Invoice No. 034 dated May 1, 1968 from George E. Ahern official court reporter, U.S. District Court, Miami, Florida 33101 addressed to undersigned counsel for Appellant for printing 21 copies of Four Volumes of Joint Appendix, and one Supplemental Volume, at a charge of $1.50 per page (no charge for binding, mailing & photographing), for a total charge of $2,187.50
which was paid

B. Invoice No. D-715 dated December 11, 1967 from Review Printing Company P.O. Box 589, Miami, Florida 33101 for printing 35 copies of Appellant's Brief at a cost of approximately $6.60 per page, including covers and binding for a total charge of 115.36

C. Invoice No. 934 dated February 1, 1968 of the Review Printing Company, for printing 35 copies of Appellant's 9-page Reply Brief to Motion to Dismiss for lack of Jurisdiction [red cover] at a charge of $6.07 per page including covers and binding for a total of 43.78

D. Invoice No. 1462 dated May 15, 1968 of the Review Printing Company for printing 35 copies of a 38-page Brief of the Appellant on the Merits and Appendix with Exhibits at a charge

of $4.50 per page	171.00
printed covers	6.50
binding charges	5.50
	$183.00
Tax	7.32
Total of	190.32

The Costs involved in Cases No. 26,479 and 26,711 are as follows:

A. Invoice No. 1976 dated September 4, 1968 of the Review Printing Company for 35 copies of a 34-page brief of Appellant at $7.50 per page for $255.00

plus 35 copies of 19-page printed appendix with exhibits at $12.50 per pg.	237.50	
plus charges for special printing of Financial statements in the exhibits, the binding and covers	127.80	
	$620.30	
plus tax	24.81	645.11
B. Review Printing Company for 35 copies of an 18-page Reply Brief of Appellant at $7.50 per pg.,	135.00	
plus $6.50 for printed covers; plus $5.66 tax—total		147.16
TOTAL COSTS ON APPEAL NO. 25,303		$2,421.60
TOTAL COSTS ON APPEALS NOS. 26,479 & 26,711		$ 792.27
TOTAL OF ALL CONSOLIDATED CASES		$3,213.87

6. Rule 39D FRAP provides:

> "* * * if the mandate has been issued before the final determination of costs, the statement or any amendment thereof, may be added to the mandate upon request to the Clerk of the Court of Appeal."

The Appellant has worked diligently to obtain the information provided in this Motion so that the Court can tax costs. The Appellant is filing this Motion for the Court to tax costs because the mandate was issued before the costs were finally determined in this case.

Wherefore, the Appellant moves this Honorable Court to tax the costs in the total amount of $3,213.87 against the Appellee, J. H. Brock, Trustee in the above three companion appeals, pursuant to the provisions of Rule 39(d) FRAP.

Dated at Miami, Florida this 19 day of February, 1969.

DIXON, BRADFORD, WILLIAMS,
McKAY & KIMBRELL, P.A.
9th Flr. Dade Federal Savings Bldg.,
101 East Flagler Street
Miami, Florida 33131
Attorneys for Appellant

By: CARL K. HOFFMANN,
Of Counsel

STATE OF FLORIDA
COUNTY OF DADE

Before me, the undersigned authority, on this date personally appeared CARL K. HOFFMAN who being duly sworn deposes and says that the statements contained in the foregoing Motion to Tax Costs are true and correct.

CARL K. HOFFMANN

Sworn to & Subscribed before me this 19th day of Feb. 1969.

Catherine G. Ashley,
NOTARY PUBLIC, State of Florida at Large.

My Commission Expires April 25, 1969.
Bonded through Fred W. Diestelhorst.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Tax Costs was mailed to the offices of IRVING M. WOLFF, attorney for the Appellee, 916 Biscayne Building, Miami, Florida 33130 this 19 day of February, 1969.

DIXON, BRADFORD, WILLIAMS
McKAY & KIMBRELL, P.A.
Attorneys for Appellant

By: CARL K. HOFFMANN,
Of Counsel

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	4
The Fee Awards	5
Standing to Appeal	9
The Record Below	10
REASONS FOR DENYING THE WRIT	10
CONCLUSION	18
CERTIFICATE OF SERVICE	19

AUTHORITIES CITED

	Page
Brown v. Gerdes, 321 U.S. 178, 181-182	15
Callaghan v. Reconstruction Finance Corp., 297 U.S. 464, 469	15
Dickinson Industrial Site, Inc. v. Cowan, 309 U.S. 382, 388	15
Gleeson v. Carr, 219 F.2d 64 (9CCA 1955)	13
Levitt v. Robinson, 402 F.2d 753 (9CCA 1968)	16
London v. Snyder, 163 F.2d 621 (8CCA 1947)	15
Lundgren v. Freeman, 307 F.2d 104 (9CCA 1962)	16
Manda v. Sinclair, 278 F.2d 629 (5CCA 1960)	12
Mayer v. National Missile and Electronics, Inc., 326 F.2d 401 (9CCA 1964)	12
Realty Associates Securities Corp. v. O'Connor, 295 U.S. 295, 299	15
Ritchie Inc., v. Chesebrough-Pond's, Inc., 281 F.2d 755 (2CCA 1960)	12
Snider v. England, 374 F.2d 717 (9CCA 1967)	17
Stein v. Hemker, 157 F.2d 740 (8CCA 1946)	16
Young v. Higbee, 324 U.S. 204, 209	11

AUTHORITIES CITED (cont.)

	Page
In Re Coast Investors, Inc., 388 F.2d 622 (9CCA 1968)	16
In Re Gilbert, 276 U.S. 294 (1928)	15
In Re Michigan-Ohio Bldg., Corp., 117 F.2d 191 (7CCA 1941)	12
In Re 32-36 North State Street Building Corp., 164 F.2d 205 (7CCA 1947)	15

OTHER AUTHORITIES CITED

11 U.S.C. 47(c)	2
11 U.S.C. 606	11
11 U.S.C. 650	10
28 U.S.C. 1254(1)	2
28 U.S.C. 1292	14
Supreme Court Rules 17 and 26	10
Supreme Court Rule 23(4)	17
Federal Rules of Appellate Procedure, Rule 30	10
Vol. 6A, Collier on Bankruptcy (14th Ed.)	12

in the
Supreme Court
of the
United States

OCTOBER TERM, 1968

CASE No. 1224

J. H. BROCK, as Trustee for The Wingreen Company, The Dania Corporation, and The Lake Worth Corporation,

Petitioner,

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Massachusetts corporation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review two judgments below of the United States Court of Appeals for the Fifth Circuit in a single bankruptcy proceeding.

OPINIONS BELOW

The Opinion of the District Court of the Southern District of Florida dated January 30, 1967 is not reported, but appears at R. 1218.

The Opinion of the District Court of the Southern District of Florida dated February 19, 1968 is not reported, but appears in Petitioner's Appendix at page 39.

The Opinion of the District Court of the Southern District of Florida dated August 6, 1968 is not reported, but appears at R. Vol. V, 1,404 and Petitioner's Appendix at page 49.

The Opinions of the Court of Appeals dated December 5, 1968 are reported at 405 F.2d 429 and 405 F.2d 435.

JURISDICTION

Jurisdiction of this Court is invoked under 11 U.S.C. Sec. 47(c) and 28 U.S.C. 1254(1).

The judgments of the court of appeals were made and entered on December 5, 1968. Petitioner's timely petition for rehearing as Appellee below was denied on January 6, 1969. The petition was filed in this Court on April 3, 1969.

QUESTIONS PRESENTED

According to the Petitioner, the petition presents the following questions:

1. Can a United States Court of Appeals, notwithstanding the provisions of the Bankruptcy Act, direct that an appeal from an interim award of fees for a reorganization trustee and his attorney be presented, other than on the original record, and other than summarily?

2. Though it is admitted that the right to be heard granted to a creditor in proceedings in reorganization contains the right to appeal, however, does such right to appeal exist when the order or decree sought to be appealed does not materially, substantially and adversely affect the appellant?

3. This Honorable Court, in the exercise of its supervisory jurisdiction, is called upon to decide questions of a substantial nature which have not been heretofore settled by this Court:

   a) Where an appellant seeks to review an interim award of fees to a reorganization trustee and his attorney, are the proceedings governed by the provisions of the Bankruptcy Act or are they governed by the statutes dealing with interlocutory appeals?

b) Where an Opinion of the United States Court of Appeals contains obvious omission and error, not supported by the record, can this Honorable Court correct the same so that the Opinion is in conformity with the record?

c) Where a trial court did not abuse its discretion, commit clearly erroneous error, make any mistake in the application of ruling law, can a United States Court of Appeals, in its effort to retry the cause, contrary to its jurisdiction, insert a "legal standard" as a justification of its application of extra-judicial jurisdiction?

STATEMENT OF THE CASE

The Petition For Certiorari involves three interim awards of fees to the Trustee in Reorganization and his attorney. On January 25, 1966, The Wingreen Company, The Dania Corporation and The Lake Worth Company, filed three independent voluntary petitions for corporate reorganization in the United States District Court for the Southern District of Florida and the three estates were consolidated on January 25, 1966.

On February 8, 1966 J. H. Brock was appointed Receiver for the three corporations, and on February 11, 1966, Irving M. Wolff was appointed the Receiver's attorney. On May 23, 1966 the Court entered its order approving Debtors' Petition for Reorganization under Chapter X, making a finding of good faith and appointing J. H. Brock as Trustee, and Irving M. Wolff as his attorney.

The Fee Awards

The Opinions of the court of appeals below hold that the interim awards of fees by the District Court to the Trustee and his attorney for three separate periods — September 1, 1966 to December 31, 1966; January 1, — June 30, 1967; June 30, 1967 — June 30, 1968; and May 24, 1966 — June 30, 1968, are excessive and constituted an abuse of discretion. Pursuant to this holding, the cause was remanded with directions to award $25.00 an hour to the Trustee and $50.00 an hour to his lawyer.

The district court fee awards considered by the court of appeals were as follows:

Table of Fees Awarded by the District Court

Date of Order	Brock (hourly rate)		Wolff (hourly rate)	
June 3, 1966*	$12,500	($35.00)	$20,000	($ 62.50)
Sept. 26, 1966	$13,500	($37.00)	$12,500	($ 72.00)
Jan. 30, 1967	$20,000	($50.00)	$25,000	($113.00)
Feb. 18, 1968	$27,500	($45.00)	$35,000	($ 89.50)
Aug. 5, 1968	$35,580		$69,000	
plus prior allowance	$61,000		$72,500	
Total**	$96,580	($40.00)	$141,500	($. 59.00)

A grand total of $270,580.00 in fees was awarded the Petitioner and his attorney for the 29 months from February 8, 1966 through June 30, 1968.

* To J. H. Brock as Receiver and his attorney.

** For the trusteeship period of May 24, 1966 through June 30, 1968.

In this Court, Petitioner has made a lengthy presentation of facts which he believes show that he and his lawyer have done an outstanding job in this case. While Petitioner is no doubt sincere in his belief, the dispute in the case concerns the valuation to be placed upon these services. The Trustee is charged with the duty of administering the assets of an estate as economically as possible. We believe the Trustee is placed in a position of a conflict of interest between himself and the creditors when it comes to the evaluation of his fees and those of his attorney. The court of appeals noted " . . . There is no evidence as to the reasonable value of the services rendered by the Trustee save his own statements . . . "

The court of appeals below states the pertinent facts as follows at 405 F.2d 432:

> "The thrust of the reorganization proceedings is one of virtual liquidation. The Dania Corporation and The Lake Worth Company were holding companies, controlling shares of the capital stock of banks. These corporations have been liquidated and washed out for all practical purposes by the sale of the stocks to liquidate indebtedness, and to dispose of pending litigation. The Wingreen Company is in operation but on a much reduced basis. It is a real estate holding company and its business consisted of acquiring real estate and developing the same by improving the parcels with apartment houses, office buildings and motels. The reorganization proceedings involved in excess of 900 creditors, with some 50 claiming secured status."

* * * * *

"We also know from the record in the case before us and from the records in the subsequent appeals that the liquidation of the debtor corporations is almost complete. As noted, Dania and Lake Worth have been virtually liquidated. The Wingreen Co. formerly owned and/or operated four motels, an office building, a warehouse building, and four apartment buildings. It also owned vacant lands. Most of these properties were heavily encumbered. All have now been liquidated or lost through sale or foreclosure or abandonment except the Ramada Inn at Cocoa Beach, Florida. That property is subject to first, second, third, and fourth mortgages. The first mortgage is to secure a debt due appellant in excess of $1,000,000. The other three mortgages are to secure debts totaling $1,390,000, including interest, as of October 1, 1968. This property was appraised for appellant in 1966 as having a value of $1,500,000. The trustee has obtained an appraisal as of April 1, 1968 of $2,200,000.

According to a report filed by the trustee, the Ramada Inn was operated at a profit of only $50,900.88 during the first nine months of 1968. The same report shows that the trustee has unrestricted cash available of only $96,029.83 as of September 30, 1968.

The record discloses that the claims of unsecured creditors totaled $1,385,713.95 as of January 25, 1966. In discussing a proposed plan of reorganization, the trustee advised the court on

December 30, 1966 that there were no stockholder equities to be dealt with and that " * * * there is little which the unsecured creditors may expect." We have found nothing in the records before us to indicate any change in this prognostication. The trustee hopes to realize something from a tax loss carry forward, subject to a ruling by the Internal Revenue Service. There is some tag end litigation which may produce assets for the debtors but what is realized, if anything, will not greatly exceed the administrative expenses.

It is apparent that the trustee and his counsel have rendered and are rendering valuable and almost daily services in connection with these Chapter X proceedings. These services have involved complex legal and business matters and we in no way disparage them. The fact remains, however, that they have been more than amply compensated for their services under the circumstances of these Chapter X proceedings."

The Opinion below after discussing the facts in detail states that "the District Court has a broad discretion in the award of fees . . . " The court of appeals concluded there had been an abuse of discretion by the district court resulting "from a difference in view as to the applicable legal standard." 405 F.2d 432. The court of appeals (first panel) went on to say in case 25303:

"[6-8] Our difference with the District Court is that we apply an additional factor: The public interest which is inherent in bankruptcy

> matters must be considered in awarding fees. The object is to draw a balance to the end that competent trustees and counsel are obtainable in matters of this kind because of the knowledge that they will be fairly compensated. They must not and cannot expect, however, to be over-compensated, for the court must exercise its discretion for the double purpose of fairly treating the trustee and his counsel while at the same time doing equity to the debtor and creditor. . . . " 405 F.2d 432-433

In cases 26479 and 26711, the court of appeals (second panel) concluded:

> "The District Court is directed to reconsider the request for fees for the stated periods . . . Thus it is that the fees for the period May 24, 1966 — June 30, 1968, . . . must be reconsidered. The facts and circumstances of these reorganization proceedings will not warrant the fees in excess of $25.00 per hour for the trustee and $50.00 per hour for counsel for this period." 405 F.2d 435-436.

Standing to Appeal

Petitioner contended below that respondent, being a disinterested secured creditor of the estates, had no standing to appeal the fee awards. On this issue, the court of appeals held:

> " . . . . Massachusetts Mutual is the holder of a first mortgage on one of the properties of

> The Wingreen Company, and its interest lies in the fact that the fees in question may result in the assessment of administrative costs against that property." 405 F.2d at 431.

The Record Below

The original record was filed in the court of appeals below. However, for the convenience of the court of appeals, the parties were directed to file a printed joint appendix. The court of appeals required the petitioner to diminish his designation of the record on appeal. However, the court of appeals provided in its Order of February 29, 1968 that the court of appeals on its own motion or upon the suggestion of the parties could direct the filing of a supplemental record or appendix. The court of appeals granted motions to supplement the record filed by the Petitioner and Respondent. (Petitioner's Appendix pp. 16, 22, 25, 26)

REASONS FOR DENYING THE WRIT

1. Section 250 (11 U.S.C. 650) of the Bankruptcy Act was fully complied with because this case was determined on the original record. The printed joint appendix which was furnished for the convenience of the court of appeals appears to be in accord with the practice of this Court under its Rules 17 and 26, and Rule 30, Federal Rules of Appellate Procedure.

2. The holding below, that a secured creditor has standing to appeal excessive fees awards which "may result in the assessment of administrative costs against that property" (405 F.2d at 431), is clearly correct in

view of Section 206 of the Bankruptcy Act (11 U.S.C. 606) which provides:

> "The debtor, the indenture trustees, and any creditor or stockholder of the debtor, shall have the right to be heard on all matters arising in a proceeding under this chapter. The judge may, for cause shown, permit a labor union or employees' association, representative of employees of the debtor, to be heard on the economic soundness of the plan affecting the interests of the employees."

The holding below on this issue is also in probable accord with this Court's decisions. In **Young** v. **Higbee,** 324 U.S. 204, 209 this Court said:

> ". . . Potts and Boag appealed under §206 of the Chandler Act, 11 U.S.C.A. 606 which, contrary to the general bankruptcy procedure, grants any stockholder or creditor the right to be heard on all matters relating to corporate reorganizations. Courts have liberally construed this language as authorizing appeals . . ."

In any event, the issue is moot because the Court of Appeals found from the record:

> ". . . Massachusetts Mutual is the holder of a first mortgage on one of the properties of The Wingreen Company, and its interest lies in the fact that the fees in question may result in the assessment of administrative costs against that property." 405 F.2d at 431.

3. The Petitioner's contention that the Opinions below stand in direct contravention of the Second, Seventh and Ninth Circuits is not supported by the cases cited. The decision below is not in conflict with any decision of another court of appeals.

Ritchie Inc., v. Chesebrough-Pond's, Inc., 281 F.2d 755 (2CCA 1960) was a trademark infringement case in which the district court sitting without a jury had dismissed the case. The case clearly does not involve Section 206 of the Bankruptcy Act. **In Re Michigan-Ohio Bldg., Corp.,** 117 F.2d 191 (7CCA 1941) involved a case in which the plan of reorganization was "carried to fruition." Two stockholders of the new reorganized company appealed the retention of jurisdiction for two years by the district court. The court of appeals dismissed the appeal on its own motion and the opinion does not even discuss Section 206 of the Bankruptcy Act. **Manda v. Sinclair,** 278 F.2d 629 (5CCA 1960) is an ordinary bankruptcy case that does not even remotely involve Section 206 of the Bankruptcy Act. **Mayer v. National Missile and Electronics, Inc.,** 326 F.2d 401 (9CCA 1964) was a contest between a judgment creditor and mortgagee, an ordinary civil action again not involving Section 206 of the Bankruptcy Act.

Vol. 6A, Collier on Bankruptcy (14th Edition) at Page 310 states:

> ". . . It is universally agreed, however, that Congress intended a more extensive right of appeal in Chapter X cases, and §208, giving the Securities and Exchange Commission under certain conditions the rights of a party in interest but withholding the right to appeal, has been point-

> ed to as indicating legislative awareness that the right to be heard carries with it the right to appeal. This enlarged right created by §206 has not, to date, developed any substantial delays in proceedings or given rise unduly to 'nuisance' appeals, a possibility originally feared in some quarters."

Contrary to Petitioner's contention of direct conflict between Circuits, the Ninth Circuit upheld the creditors right to appeal under Section 206 in the corporate reorganization case of **Gleeson** v. **Carr,** 219 F.2d 64 (9CCA 1955), and listed the opinions of the Ninth Circuit, Third Circuit, Second Circuit, Seventh Circuit and First Circuit which are in harmony with the Opinions in the instant case. The Court said:

> "The right to be heard under this section includes the right to appeal. Rogers v. Consolidated Rock Products Co., 9 Cir., 1940, 114 F.2d 108; In re Keystone Realty Holding Co., 3 Cir., 1941; 117 F.2d 1003; Dana v. Securities & Exchange Commission, 2 Cir., 1942, 125 F.2d 542; In re South State Street Bldg., Corp., 7 Cir., 1943, 140 F.2d 363; Horowitz v. Kaplan, 1 Cir., 1951, 193 F.2d 64."

The practical thrust of Petitioner's contention is that no secured creditor could appeal until after administrative costs were assessed against that creditor and the damage was done. In a liquidation case such as this with no assets or almost no assets available for distribution to unsecured creditors, it is highly improbable that they would appeal. Since the Trustee reported that there were

no stockholders equities to be dealt with (R.1261), stockholders of the debtor would not appeal.

4. We do not see how Title 28 U.S.C. 1292 applies to this appeal or what difference it makes. This statute was not argued by the Petitioner in any of his several briefs below, and was not considered by the court of appeals below, and is being raised in this Court for the first time.

5. While Petitioner and his attorney now claim they each worked some 300 hours more than the opinion below reflects, and that the hourly rate for the district court awards was not as high as computed in the opinion below, the error, if any, in this regard would be harmless. All that the opinion below does is to remand with directions to compute their respective fees at $25.00 and $50.00 per hour for the periods in question. The hours for the period in question are admittedly correct. Accordingly on remand the district court will apply the prescribed rates to the correct number of house involved. Moreover, Petitioner does not refer us to any portion of the record to support his computation of the hours involved.

6. On this excessive fee issue, the opinion below states:

> "[6-8] Our difference with the District Court is that we apply an additional factor: The public interest which is inherent in bankruptcy matters must be considered in awarding fees. The object is to draw a balance to the end that competent trustees and counsel are obtainable in matters of this kind because of the knowledge that they will be fairly compensated. They must

> not and cannot expect, however, to be overcompensated, for the court must exercise its discretion for the double purpose of fairly treating the trustee and his counsel while at the same time doing equity to the debtor and creditors ..." 405 F.2d 432-433

The legal principle followed by the court of appeals was laid down by this Court in the case of **In re Gilbert,** 276 U.S. 294 (1928) in which this Court admonished the lower federal courts that in awarding fees to officers of the court they should avoid "vicarious generosity." This Court has consistently held that Trustees in Bankruptcy are public officers who can be paid only under clear warrant of law. Further that "the desire to reduce the cost of reorganization [was] one of the controlling reasons for the enactment" of the bankruptcy statutes. **Callaghan** v. **Reconstruction Finance Corp.,** 297 U.S. 464, 469; **Realty Associates Securities Corp.** v. **O'Connor,** 295 U.S. 295, 299; **Dickinson Industrial Site, Inc.,** v. **Cowan,** 309 U.S. 382, 388; **Brown** v. **Gerdes,** 321 U.S. 178, 181-182.

There is no conflict between the circuits on the fee issue. Simply stated, the court of appeals below did not conduct a trial de novo in this case. As was noted by the court of appeals in the reorganization case of **London** v. **Snyder,** 163 F.2d 621 (8CCA 1947), the compensation allowed others in the same proceeding or in other reorganization cases affords little evidence of the reasonableness of the allowance in any particular case.

A reading of the cases cited by the Petitioner easily shows that there is no conflict with the Opinions in this case. **In Re 32-36 North State Street Building Corp.,** 164

F.2d 205 (7CCA 1947), the master eliminated one claim for fees, and substantially reduced three others, including a reduction of the Trustee from $12,000. to $10,000. in this reorganization case. The master, district court and court of appeals agreed that the services of counsel for appellants was for the benefit of their clients and not the estate. The court of appeals found no abuse of discretion.

In **Stein** v. **Hemker**, 157 F.2d 740 (8CCA 1946), the attorney for the debtor sought a fee of $12,000. and was awarded $2,000. The court of appeals found no abuse of discretion and emphasized the need for economical administration in a corporate reorganization. **In Re Coast Investors, Inc.**, 388 F.2d 622 (9CCA 1968), an attorney for a creditor committee sought $18,000. and appealed because he was allowed only $10,000. The court of appeals found no abuse of discretion because the attorney had duplicated in part the services of the Trustee and his attorney. **Levitt** v. **Robinson**, 402 F.2d 753 (9CCA 1968) was a Chapter 11 Proceeding in which the attorney received compensation of $2,794.28 prior to an arrangement petition. Afterwards the Referee in Bankruptcy allowed a fee of $750. and surcharged the attorney $1,903.78. The court of appeals found no error in the Referee's Findings of Fact (approved by the district court) nor mistake in applying the proper legal standard.

The last two cases cited by the Petitioner to show conflict in the circuits are not even remotely related to the legal standards applicable in determining reasonable compensation in a corporate reorganization case. **Lundgren** v. **Freeman**, 307 F.2d 104 (9CCA 1962) was a damage action involving a dispute between a contractor, a school district and architects. The district court found a mutual

mistake of fact and reformed the contract. The court of appeals held the judgment was not clearly erroneous. **Snider v. England,** 374 F.2d 717 (9CCA 1967) was an action in which the district court set aside a preference in bankruptcy and entered judgment against the appellant. The court of appeals held the judgment was not clearly erroneous.

7. Supreme Court Rule 23(4) provides:
"The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be sufficient reason for denying his petition."

Petitioner has not stated the "Questions Presented" or the "Reasons For Granting The Writ" with the required "accuracy, brevity, and clearness." The Petitioner is simply seeking to have this Court re-examine the reasonableness of his compensation after it has been very carefully considered by six able judges of the Fifth Circuit Court of Appeals.

8. The opinions below are correct and do substantial justice between the parties. This Court has often admonished the federal courts to keep down the costs of judicial proceedings. The court of appeals below followed the policy of this Court by keeping a balance between "the public interest" and the need for just compensation for officers of the court.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals For The Fifth Circuit should be denied.

Respectfully submitted,

CARL K. HOFFMANN
900 Dade Federal Savings Building
101 East Flagler Street
Miami, Florida 33131
Attorney for Respondent
MASSACHUSETTS MUTUAL
LIFE INSURANCE COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief in Opposition to Petition For a Writ of Certiorari to the United States Court of Appeal for the Fifth Circuit, was mailed to the attorney for the Petitioner, IRVING M. WOLFF, ESQ., 916 Biscayne Building, Miami, Florida 33130, this day of April, 1969.

CARL K. HOFFMANN